No. 17-459	
Title:	**Wescley Fonseca Pereira, Petitioner** **v.** **Jefferson B. Sessions, III, Attorney General**
Docketed:	September 28, 2017
Lower Ct:	United States Court of Appeals for the First Circuit
Case Numbers:	(16-1033)
Decision Date:	July 31, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Sep 27 2017	Petition for a writ of certiorari filed. (Response due October 30, 2017)
Oct 25 2017	Order extending time to file response to petition to and including November 29, 2017.
Oct 30 2017	Brief amicus curiae of American Immigration Lawyers Association filed.
Nov 15 2017	Motion to extend the time to file a response from November 29, 2017 to December 12, 2017, submitted to The Clerk. **Main Document**
Nov 16 2017	Order further extending time to file response to petition to and including December 12, 2017.
Dec 12 2017	Brief of respondent Jefferson B. Sessions, III, Attorney General in opposition filed. **Main Document** **Proof of Service**
Dec 13 2017	Waiver of the 14-day waiting period under Rule 15.5 filed by petitioner. **Main Document**
Dec 19 2017	Reply of petitioner Wescley Fonseca Pereira filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 20 2017	DISTRIBUTED for Conference of 1/5/2018.
Jan 08 2018	DISTRIBUTED for Conference of 1/12/2018.

Jan 12 2018	Petition GRANTED.
Jan 25 2018	As Rule 34.6 provides, "If the Court schedules briefing and oral argument in a case that was governed by Federal Rule of Civil Procedure 5.2(c) or Federal Rule of Criminal Procedure 49.1(c), the parties shall submit electronic versions of all prior and subsequent filings with this Court in the case, subject to [applicable] redaction rules." Subsequent party and amicus filings in the case should now be submitted through the Court's electronic filing system, with any necessary redactions.
Feb 21 2018	Brief of petitioner Wescley Fonseca Pereira filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 21 2018	Joint appendix filed. (Statement of costs filed.) **Main Document** **Proof of Service**
Feb 23 2018	SET FOR ARGUMENT on Monday, April 23, 2018.
Feb 28 2018	Brief amicus curiae of National Immigrant Justice Center filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 28 2018	Brief amici curiae of American Immigration Lawyers Association, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 28 2018	Brief amicus curiae of Former BIA Chairman & Immigration Judge Schmidt filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 07 2018	CIRCULATED
Mar 23 2018	Brief of respondent Jefferson B. Sessions, III, Attorney General filed. (Distributed) **Main Document** **Certificate of Word Count**

NAME	ADDRESS	PHONE
Attorneys for Petitioner		
William McGinley Jay Counsel of Record	Goodwin Procter LLP 901 New York Ave., NW Washington, DC 20001 wjay@goodwinlaw.com	202-346-4000
Party name: Wescley Fonseca Pereira		

Attorneys for Respondent

Noel J. Francisco
Counsel of Record

United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

SupremeCtBriefs@USDOJ.gov

202-514-2217

Party name: Jefferson B. Sessions, III, Attorney General

Other

Eric F. Citron
Counsel of Record

Goldstein & Russell, P.C.
7475 Wisconsin Ave., Suite 850
Bethesda, MD 20814

ecitron@goldsteinrussell.com

202-362-0636

Party name: Former BIA Chairman & Immigration Judge Schmidt

Bradley N. Garcia
Counsel of Record

O'Melveny & Myers, LLP
1625 Eye St., N.W.
Washington, DC 20006

bgarcia@omm.com

202 383 5300

Party name: American Immigration Lawyers Association, et al.

Lindsay C. Harrison
Counsel of Record

Jenner & Block, LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001

LHarrison@jenner.com

(202)-639-6000

Party name: National Immigrant Justice Center

RECORD AND BRIEFS

17-459

FILED
SEP 27 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No.

IN THE

Supreme Court of the United States

WESCLEY FONSECA PEREIRA,

Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID J. ZIMMER
ALEXANDRA LU
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210

JEFFREY B. RUBIN
TODD C. POMERLEAU
RUBIN POMERLEAU PC
3 Center Plaza, Ste. 400
Boston, MA 02108

WILLIAM M. JAY
Counsel of Record
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinlaw.com
(202) 346-4000

Counsel for Petitioner

September 27, 2017

QUESTION PRESENTED

The Attorney General can cancel removal of certain immigrants under 8 U.S.C. § 1229b(a) and (b). To be eligible for cancellation of removal, a non-permanent resident must have ten years of continuous presence in the United States, and a permanent resident must have seven years of continuous residence. *Id.* § 1229b(a)(2), (b)(1)(A). Under the "stop-time rule," those periods end when the government serves a "notice to appear under section 1229(a) of this title." *Id.* § 1229b(d)(1). Section 1229(a) defines a "notice to appear" as "written notice . . . specifying" certain information, including "[t]he time and place at which the proceedings will be held." *Id.* § 1229(a)(1).

The First Circuit held, disagreeing with the Third Circuit but agreeing with the Board of Immigration Appeals and other circuits, that the stop-time rule is triggered when the government serves a document that is labeled "notice to appear" but that lacks the "time and place" information required by the definition of a qualifying "notice to appear."

The question presented is:

Whether, to trigger the stop-time rule by serving a "notice to appear," the government must "specify" the items listed in the definition of a "notice to appear," including "[t]he time and place at which the proceedings will be held."

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wescley Fonseca Pereira respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-16a) is reported at 866 F.3d 1. The decision of the Board of Immigration Appeals (Pet. App. 17a-19a) is unreported. The decision of the immigration judge (Pet. App. 20a-25a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1229b(b)(1) provides in relevant part:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—
>
> > (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application * * * * .

8 U.S.C. § 1229b(d)(1) provides in relevant part:

> For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end * * * when the alien is served a notice to appear under section 1229(a) of this title.

8 U.S.C. § 1229(a)(1) provides in relevant part:

> In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:
>
> * * * *
>
> (G)(i) The time and place at which the proceedings will be held.

The full text of Sections 1229 and 1229b is reprinted in the Appendix, *infra*, at 26a-43a.

INTRODUCTION

This case concerns an acknowledged circuit conflict concerning the immigration "stop-time rule." That rule can render an immigrant ineligible for cancellation of removal, an important form of relief open to the most deserving applicants. If the petitioner had appeared in a different immigration court in a circuit on the other side of the conflict, he might well be allowed to stay in the United States with his wife and two young, U.S.-citizen children.

To be eligible for cancellation, an immigrant must establish a specified period of continuous residence

in the United States. Under the stop-time rule, that period of continuous residence ends upon service of a "notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). Section 1229(a) defines a "notice to appear" as a document that specifies particular information, including the time at which the immigrant must appear for a removal hearing.

The entrenched circuit conflict concerns whether the government can still stop the clock if it omits the statutorily required information about the removal hearing. The court below and five other circuits have held, deferring to the Board of Immigration Appeals ("BIA"), that the Department of Homeland Security ("DHS") triggers the stop-time rule when it serves a document labeled a "notice to appear," even if the document does not state when the immigrant must appear, as required by § 1229(a)'s "notice to appear" definition. The Third Circuit, however, has rejected these decisions, concluding that under the statute's plain text, service of a written notice that does not include the information specified in § 1229(a)'s "notice to appear" definition is not service of a "notice to appear under § 1229(a)," and does not trigger the stop-time rule.

The conflict is entrenched, and the issue recurs frequently. The Third Circuit's decision explicitly addressed, and disagreed with, five of the other courts of appeals, and the First Circuit's decision in this case explicitly addressed, and disagreed with, the Third Circuit's decision. All seven of those published decisions have come in the last three years alone, and the same issue has been the subject of numerous unpublished decisions. When the question presented arises, it is often, as in this case, disposi-

tive of an immigrant's eligibility for cancellation of removal.

The circuit conflict is particularly pernicious given that the BIA's position is plainly incorrect. The statute triggers the stop-time rule only on service of a "notice to appear under section 1229(a)," and § 1229(a) defines a "notice to appear" as a document that includes specific information, including the time of the removal hearing. Under the statute's plain terms, a document that *lacks* this information is not a "notice to appear under § 1229(a)," and service of such a document does not trigger the stop-time rule.

The court below, following the BIA, relied heavily on the "administrative context" to support the contrary reading. But a desire to make life easier for DHS cannot overcome the statute's unambiguous text. Further, the administrative context that the BIA sought to accommodate—a DHS regulation authorizing a two-step notice-to-appear process—actually undermines, not supports, the BIA's interpretation of the stop-time rule.

The question presented can cut off eligibility for an important form of relief even in the most deserving instances, as this case demonstrates. Petitioner Wescley Pereira is the father of, and primary breadwinner for, two young, U.S.-citizen children. He is a respected member of the community in Martha's Vineyard, where he has lived for more than a decade. This Court should grant certiorari to ensure that whether people like Mr. Pereira are eligible for cancellation of removal does not turn on the happenstance of where they are brought into immigration court.

STATEMENT

A. Cancellation Of Removal Is An Important Discretionary Form Of Relief Available To The Most Deserving Immigrants.

For more than a century, the immigration laws have given the Attorney General (or another official) discretion to allow deserving immigrants with U.S. family connections to remain as lawful permanent residents, even if they were otherwise inadmissible or removable. *See, e.g.*, Immigration Act of 1917, § 3, proviso 7, ch. 29, 39 Stat. 874, 878. As one Congressional report explained, such provisions are intended to protect "aliens of long residence and family ties in the United States," whose removal "would result in a serious economic detriment to the[ir] family." S. Rep. No. 81-1515, at 600 (1950).

The current statute gives the Attorney General the power to grant "cancellation of removal," and a green card, to eligible non-permanent residents when their removal would cause "exceptional and extremely unusual hardship" to a spouse, parent, or child who is a United States citizen or lawful permanent resident. 8 U.S.C. § 1229b(b). This discretionary relief is only available to those with "good moral character" who have not been convicted of specified criminal offenses. *Id.* The Attorney General can also cancel removal for permanent residents who have not been convicted of an aggravated felony when the equities favor allowing them to remain in the country. *Id.* § 1229b(a); *Matter of Sotelo-Sotelo*, 23 I. & N. Dec. 201, 203 (BIA 2001). Cancellation is one of the most important tools for keeping immigrant families united and allowing immigrants who have made positive

contributions to their communities to remain in the country.

To be eligible, an applicant for cancellation of removal as a non-permanent resident must have "been physically present in the United States for a continuous period of not less than 10 years immediately preceding the" cancellation application. 8 U.S.C. § 1229b(b)(1). If the applicant is a lawful permanent resident, the required period is 7 years of continuous residence. *Id.* § 1229b(a)(2).[1]

B. The Period Of Residence Necessary For Cancellation Of Removal Is Deemed To End Upon Service Of A "Notice To Appear," Which The Statute Defines As Written Notice Specifying Particular Information.

The stop-time rule at issue in this case was adopted to address a very specific problem with earlier forms of discretionary relief. Before 1996, when eligibility for relief turned on a specified period of U.S. residence, that period continued to run during the pendency of removal proceedings. *See Matter of Cisneros-Gonzalez*, 23 I. & N. Dec. 668, 671 (BIA 2004). Congress grew concerned that immigrants had an incentive to obstruct and slow removal proceedings in order to satisfy the residence requirement. *Id.*

In response, Congress enacted the "stop-time" rule. Under this rule, "any period of continuous residence or continuous physical presence in the United States

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[1] For simplicity, the term "continuous residence" is at times used in this petition to encompass both durational requirements.

shall be deemed to end . . . when the alien is served a notice to appear under section 1229(a) of this title." 8 U.S.C. § 1229b(d)(1). In other words, Congress specified that the stop-time rule is triggered by service of a specific document: "a notice to appear under section 1229(a)."

Section 1229(a), in turn, provides that the document "in this section referred to as a 'notice to appear'" is "written notice . . . specifying" particular information. 8 U.S.C. § 1229(a)(1). Included on that list are the key pieces of information an immigrant needs in order to "appear" at a hearing—information like the "acts or conduct alleged to be in violation of law"; the "charges against the alien and the statutory provisions alleged to have been violated"; the fact that the "alien may be represented by counsel"; the "time and place at which the proceedings will be held"; and the "consequences . . . of failure . . . to appear at such proceedings." *Id.*

B. The Board Of Immigration Appeals Concludes That A Notice Triggers The Stop-Time Rule Even If It Does Not Include The Time Of Proceedings, As Required By The Definition Of A "Notice To Appear."

Two courts of appeals initially interpreted the stop-time rule to apply only once an immigrant receives written notice of *all* the information listed in the statute's definition of a notice to appear. *Guamanrrigra v. Holder*, 670 F.3d 404, 410-11 (2d Cir. 2012); *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 937 n.3 (9th Cir. 2005). But the BIA disagreed with those

decisions and adopted the opposite interpretation. *Matter of Camarillo*, 25 I. & N. Dec. 644 (BIA 2011).

DHS had served Camarillo, a lawful permanent resident, with a document that DHS had labeled as a notice to appear, but that did not state the date or time of any hearing. *Id.* at 644. More than two years later, after she had maintained sufficient U.S. residence to qualify for cancellation (seven years), Camarillo received a hearing notice. *Id.* Camarillo applied for cancellation of removal, and the Immigration Judge ("IJ") granted her application. *Id.* The IJ concluded that Camarillo was eligible because her period of continuous residence continued until she received written notice of all of the information required in a "notice to appear," which did not occur until she was informed of the date and time for her appearance. *Id.*

The BIA reversed, concluding that Camarillo stopped accruing residence when DHS served its initial notice, even though that document did not include the statutorily-required time of her hearing. *Id.* The BIA held that while the IJ's reading of the statute was "plausible," an "equally plausible" reading was that the reference to a "notice to appear under section [1229](a)" is "simply definitional." *Id.* at 647. According to the BIA, under this "definitional" reading, the statutory phrase merely "specifies the document the DHS must serve on the alien to trigger the 'stop-time' rule," but does not impose *any* "substantive requirements" as to what must be in that document to end the period of continuous residence. *Id.*

Having found the statutory language "ambiguous," the BIA concluded that the "best reading" of the

statute is its "definitional" one. *Id.* The BIA concluded that the "key phrase" is "served a notice to appear," and that the words "under section [1229](a)" merely "specify the document the DHS must serve." *Id.* This reading, according to the BIA, was consistent with regulations stating that the date and time of an initial hearing should only be included in the notice to appear "where practicable"; if that information is left out, then the Immigration Court must schedule and provide notice of the hearing. *Id.* at 648 (quoting 8 C.F.R. § 1003.18(b)). Finally, the BIA relied on the legislative history, which shows that the purpose of the stop-time rule was "to prevent aliens from being able to 'buy time'" and delay proceedings so that they would qualify "for forms of relief that were unavailable to them when proceedings were initiated." *Id.* at 649.

C. The Courts of Appeals Conflict Regarding Whether Incomplete Notice Triggers The Stop-Time Rule.

After *Camarillo*, five circuits, including the two that had previously adopted the opposite interpretation, deferred to the BIA under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Moscoso-Castellanos v. Lynch*, 803 F.3d 1079 (9th Cir. 2015); *Guaman-Yuqui v. Lynch*, 786 F.3d 235 (2d Cir. 2015); *Gonzalez-Garcia v. Holder*, 770 F.3d 431 (6th Cir. 2014); *Wang v. Holder*, 759 F.3d 670 (7th Cir. 2014); *Urbina v. Holder*, 745 F.3d 736 (4th Cir. 2014). The Third Circuit, however, carefully considered those decisions and reached the opposite conclusion. *Orozco-Velasquez v. Attorney General*, 817 F.3d 78 (3d Cir. 2016).

1. The Fourth Circuit was the first of the circuits to defer to the BIA's interpretation. DHS served Urbina with a notice that did not include the date and time of his hearing "shortly before the statute's ten years would [have] accrue[d]." 745 F.3d at 738. The court held, with only cursory analysis, that "[b]oth the BIA's and Urbina's readings are plausible in light of the text," and that the BIA's choice of the "definitional" interpretation "merits deference" under *Chevron*'s second step. 745 F.3d at 740.

The Seventh Circuit in *Wang* followed suit, concluding that the Fourth's Circuit's decision to defer to the BIA "makes sense to us." 759 F.3d at 674. DHS served Wang with an incomplete notice to appear only two days after Wang arrived in the United States. 759 F.3d at 671. The government never properly served a hearing notice, however, and over the next ten years Wang married and had two U.S.-citizen children, before finally seeking a hearing himself. *Id.* at 672. In addition to adopting the Fourth Circuit's reasoning, such as it was, the Seventh Circuit analogized DHS's failure to include the statutorily-required hearing date to a *pro se* litigant's failure to sign a notice of appeal, which this Court held was a "curable defect" in *Becker v. Montgomery*, 532 U.S. 757 (2001). *Wang*, 759 F.3d at 674.

Over the next year and a half, the Sixth, Second, and Ninth Circuits joined the Fourth and Seventh Circuits in deferring to the BIA. The reasoning in those decisions was largely identical to the reasoning from the Fourth and Seventh Circuit decisions. *Gonzalez-Garcia*, 770 F.3d at 434-35; *Guaman-Yuqui*, 786 F.3d at 238-40; *Moscoso-Castellanos*, 803 F.3d at 1082-83. Though the Second and Ninth Circuits had

previously held that an incomplete notice does *not* trigger the stop-time rule, those courts reversed course in light of *Camarillo*. *Guaman-Yuqui*, 786 F.3d at 240-41; *Moscoso-Castellanos*, 803 F.3d at 1082 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 984-85 (2005)).

2. The Third Circuit rejected these decisions and held that the statutory language unambiguously requires service of all of the information required in the statutory definition of a "notice to appear" before the stop-time rule applies. *Orozco-Velasquez*, 817 F.3d at 82-86.

Orozco-Velasquez had been continuously present in the United States for at least nine years when DHS served him with a notice ordering him to appear before an IJ at some unspecified future date and time. *Id.* at 79. Almost two years later, DHS served him with an additional notice that informed him of the date and time his proceedings would commence. *Id.* Relying on *Camarillo*, the BIA concluded that Orozco-Velasquez was ineligible for cancellation of removal. *Id.* at 80.

The Third Circuit granted Orozco-Velasquez's petition for review. The court "disagree[d] with those of our sister circuit courts of appeals that have found ambiguity in § 1229b(d)(1)'s 'stop-time' definition." *Id.* at 82. The court explained that § 1229(a) specifies the precise information that "shall" be included in a "written notice" for that notice to constitute a "notice to appear." *Id.* at 82. Section 1229b(d)(1), in turn, "specifically incorporates the aforementioned notice requirements" by triggering the stop-time rule only on service of a "notice to appear under section 1229(a)." *Id.* Thus, the court held, the statute un-

ambiguously provides that written notice lacking the information required by § 1229(a) is not a "notice to appear under section 1229(a)," and hence does not trigger the stop-time rule. *Id.* at 82-83.

The court further explained that the BIA's "definitional" reading of the statute, under which service of any document labeled as a "notice to appear" triggers the stop-time rule, would lead to absurd results. Under the BIA's reading, "a 'notice to appear' containing no information whatsoever [could be] a 'stop-time' trigger, permitting the government to fill in the blanks (or not) at some unknown time in the future." *Id.* at 84. This result "contradicts the plain text of the INA's 'stop-time' and [notice-to-appear] provisions." *Id.*

D. The First Circuit In This Case Rejects The Third Circuit's Decision, Deepening The Circuit Conflict.

1. Petitioner Wescley Pereira originally entered the United States on a tourist visa in June 2000, when he was 19 years old. Pet. App. 3a, 21a. He is now married and has two children, both of whom are U.S. citizens: Maria Luiza Gomes Fonseca, who is four years old, and Keiry Cristall Gomes Fonseca, who is eight years old. A.R. 23-25. Mr. Pereira and his family live on Martha's Vineyard, where Mr. Pereira works as a handyman and is the primary breadwinner for his family. A.R. 183-90. Mr. Pereira has become a well-respected member of the Martha's Vineyard community. His only criminal convictions, nearly a decade apart, were for an OUI in 2006 (when he was 26) that was ultimately expunged, and a conviction for driving on a suspended license. A.R.

41, 45. Neither of these crimes are removable offenses. The administrative record includes numerous letters from neighbors, friends, fellow churchgoers, and employers describing Mr. Pereira as not just a "wonderful, dedicated father and gentle husband," but a "hard worker" who is "as honest as they come," "goes out of his way to help not just his neighbors, but everyone that he can," and "contributes in a very positive way to our community." A.R. 183-190.

2. In May 2006, DHS personally served Mr. Pereira with a notice to appear, charging him as removable for overstaying his visa. That notice, however, did not state the date or time of his initial hearing. Pet. App. 3a. More than a year later, DHS filed the notice to appear with the immigration court, and the court tried to mail Mr. Pereira a notice setting the time of his hearing. However, the court used an incorrect mailing address, and the notice was returned as undeliverable. Pet. App. 3a & n.1, 21a. The court held a hearing in absentia and ordered Mr. Pereira removed. Pet. App. 3a.

Mr. Pereira remained in the United States, having never received any hearing notice, and having no knowledge of the in absentia removal order.

3. In March 2013, after Mr. Pereira had been physically present in the United States for well over ten years, he was pulled over for not having his headlights on. He was ultimately detained by DHS. Pet. App. 3a; A.R. 45. Because the immigration court had sent the 2007 hearing notice to the wrong address, the IJ reopened the removal proceedings.

Mr. Pereira applied for cancellation of removal under § 1229b(b)(1). Pet. App. 3a-4a. He argued that

his period of continuous presence continued after the 2006 notice because that notice did not identify when he was to appear, as required by statute. *Id.* Relying on the BIA's decision in *Camarillo*, the IJ pretermitted the application, and the BIA affirmed. Pet. App. 4a, 17a-25a.

4. The First Circuit denied a petition for review. In applying *Chevron*'s first step, the court expressly "disagree[d] with the Third Circuit's holding that the stop-time rule unambiguously incorporates the requirements of § 1229(a)(1)." Pet. App. 9a. The court recognized that "§ 1229(a)(1) creates a duty requiring the government to provide an alien with the information listed in that provision." Pet. App. 8a. But it nevertheless found the statute ambiguous because the stop-time rule "does not explicitly state" that a notice to appear must satisfy that duty "in order to cut off an alien's period of continuous physical presence." Pet. App. 9a. The court acknowledged that the stop-time rule explicitly referenced a notice to appear "under § 1229(a)," but concluded that this language does not "clearly indicate" that the written notice necessary to trigger the stop-time rule must satisfy the requirements for a notice to appear under § 1229(a). *Id.*

Like the Sixth and Seventh Circuits, the court also relied on this Court's decision in *Becker* generously construing a *pro se* filing. The court reasoned that if "an unsigned notice of appeal could qualify as timely filed, even if the missing signature was not provided within the filing period," the government's failure to provide a date and time of an initial removal hearing "may be a 'curable' defect that does not prevent the notice from serving its purpose." Pet. App. 8a.

The court acknowledged that, as the Third Circuit explained, even a blank notice to appear would trigger the stop-time rule under the BIA's reasoning. Pet. App. 8a-9a n.5. The court did not explain how that reasoning could be consistent with the statute, but instead stated that because "the facts of this case involve only an initially omitted, but later provided, hearing date, . . . this case does not require us to define the boundaries of our deference to the agency's statutory construction of the applicable provisions." *Id.*

Having found the statutory language ambiguous, the First Circuit then concluded, under *Chevron*'s second step, that the BIA's interpretation was a permissible one. The court agreed with the BIA that its interpretation was supported by the statutory structure, the administrative context, and the legislative history. Pet. App. 9a-14a.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to resolve the circuit conflict concerning whether notice that does not meet § 1229(a)'s definition of a "notice to appear" nevertheless constitutes a "notice to appear under section 1229(a)," triggering the stop-time rule. That issue is vitally important. It arises frequently, as the seven published appellate decisions addressing the issue in just over three years demonstrate. And when that issue determines eligibility for cancellation, it can have a life-changing impact not only on cancellation applicants, but also on their U.S.-citizen children and spouses who would suffer "exceptional and extremely unusual hardship" if their mother, father, or spouse were removed from the country. 8

U.S.C. § 1229b(b)(1)(D). Immigrants like Mr. Pereira should not be denied the opportunity to seek this fundamental form of relief because their removal proceedings took place in Massachusetts instead of Pennsylvania.

Certiorari is particularly important because the BIA's reading of the statute is so clearly wrong. To stop the clock, the government must serve "a notice to appear under § 1229(a)." 8 U.S.C. § 1229b(d)(1). Section 1229(a) then defines a "notice to appear" as "written notice . . . specifying the following: . . . (G)(i) The time and place at which the proceedings will be held." When DHS serves notice that does *not* specify the time or place at which proceedings will be held, DHS has not served a "notice to appear under § 1229(a)," and has not stopped the period of continuous residence. And even if the definition did not foreclose the BIA's interpretation, the statutory structure and legislative history confirm the statute's unambiguous meaning: labeling a piece of paper a "notice to appear" does not make it one.

This case is an ideal vehicle to resolve the circuit conflict. Mr. Pereira has preserved the question presented throughout his proceedings. The IJ and BIA decisions make clear that the question presented is dispositive of Mr. Pereira's eligibility for cancellation of removal. And Mr. Pereira has a strong case for cancellation on the merits: He is the primary breadwinner for his two young, U.S.-citizen children, and is a beloved, respected, and hard-working member of the Martha's Vineyard community.

I. The Court Should Grant Certiorari To Resolve A Circuit Conflict On An Important And Recurring Issue Concerning Eligibility For Cancellation Of Removal.

The acknowledged circuit conflict concerning the question presented in this case cannot be resolved without this Court's intervention. Given how frequently that question arises, and how important it is when it does arise, this Court should grant certiorari now to resolve the conflict.

1. There is a clear circuit conflict concerning whether written notice that does not provide notice of the date and time of the initial hearing ends an immigrant's period of continuous residence for purposes of cancellation of removal. Pet. App. 9a. The Third Circuit has held that such notice does *not* end the period of continuous residence. Pp. 11-12, *supra*. The First, Second, Fourth, Sixth, Seventh and Ninth Circuits have all felt constrained by deference principles to disagree, deferring to the BIA's decision that so long as DHS serves a document that it labels a "notice to appear," it does not matter whether the document meets the statutory requirements for an actual notice to appear. Pp. 10-11, 14-15, *supra*. The seven circuits that have addressed this issue handle the vast majority—approximately 86%[2]—of petitions for review from the BIA.

This circuit conflict inevitably leads to unfair results. If Mr. Pereira lived in Pennsylvania, he could have applied for cancellation of removal and sought

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[2] *See* U.S. Courts, Judicial Business, Table B-3 (2016), available at http://www.uscourts.gov/sites/default/files/data_tables/jb_b3_0930.2016.pdf.

to stay in the United States to continue to care for his wife and U.S.-citizen daughters. Indeed, given that venue in immigration cases depends on where the government initiates removal proceedings, 8 U.S.C. § 1252(b)(2); 8 C.F.R. § 1003.14(a), Mr. Pereira may have been able to apply for cancellation if he had been pulled over and detained by DHS while on a road trip through Pennsylvania, rather than at home in Massachusetts. Only this Court can alleviate the inevitable inequities caused by the disparate interpretations of the stop-time rule across the circuits.

2. This circuit conflict will not resolve without this Court's intervention. The Third Circuit rejected the BIA's position after five courts had already deferred to the BIA. The Third Circuit explicitly considered those decisions—with the benefit of *amicus* counsel appointed to address this specific issue—and "disagree[d] with . . . our sister circuit courts of appeals." *Orozco-Velasquez*, 817 F.3d at 80, 83. There is thus no reason the Third Circuit would alter its position.[3] The First Circuit's decision in this case ends any chance that the other courts of appeals would change course to agree with the Third Circuit: The First Circuit explicitly "disagree[d] with the Third Circuit's holding" and endorsed the majority approach. Pet. App. 9a. Only this Court's intervention can resolve the conflict. And further percolation is unlikely to be of any benefit to the Court, because the decision below and decisions agreeing with it rest on deference to the BIA.

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[3] After losing *Orozco-Velasquez*, the government did not even ask the full Third Circuit to reconsider its decision.

3. Granting certiorari now is particularly necessary given that the issue dividing the circuits is both frequently recurring and vitally important to immigrants. As the seven published opinions in just over three years demonstrate, the key facts recur regularly: DHS regularly serves notices to appear without providing any information concerning when the immigrant is actually supposed to appear. The immigrant often waits a year or more before receiving any proper notice of a hearing date. *E.g.*, Pet. App. 3a; *Wang*, 759 F.3d at 671-72. And by the time that notice arrives, the immigrant often has crossed over the ten-year mark (or seven-year mark for permanent residents).

Ineligibility based on the stop-time rule will often determine whether families with U.S.-citizen spouses and children can remain intact. The immigrants affected by this rule are those who could obtain cancellation on the merits, if only they were found eligible—permanent residents who have made positive contributions to their community, and longtime non-permanent residents with good records, good character, and a spouse, parent, or child who is a citizen or lawful permanent resident. 8 U.S.C. § 1229b(a), (b)(1). By definition, rendering ineligible a non-permanent resident who would otherwise qualify would work "exceptional and extremely unusual hardship"—on children separated from a parent, on a husband or wife separated from a spouse. *Id.* § 1229b(b)(1)(D). Only this Court can resolve the conflict and prevent the conflicting circuit decisions from separating families arbitrarily—and erroneously.

II. Certiorari Is Particularly Important Because The BIA's Interpretation Is Wrong.

The circuit conflict at issue in this case is particularly pernicious because the Third Circuit's position is the right one. The statute's plain text makes clear that the stop-time rule does not end the period of continuous residence until the immigrant has been served with *all* the information that together constitutes a "notice to appear under section 1229(a)." Applying the traditional tools of statutory interpretation, including statutory structure and legislative history, strengthens that straightforward reading of the statute. Given the text's clarity, the Third Circuit correctly concluded that the BIA's statutory interpretation fails at *Chevron*'s first step.

The BIA and First Circuit decisions cannot be justified by what the First Circuit described as the "administrative context." This "context" refers to DHS's regulation that specifically authorizes service of an initial notice to appear that does *not* include the date and time of the hearing. Even if this regulation endorsing a two-step notice process is valid, it cannot justify the BIA's counter-textual statutory interpretation of the stop-time rule. Perhaps DHS can, for its own convenience, authorize service of a notice to appear using multiple steps. But under the statute's plain text, the immigrant's period of continuous residence runs until he receives the information required by the statute. If DHS wants to use a multi-step process, it cannot stop the clock just by taking the first step.

A. Under The Statute's Unambiguous Text, Notice That Does Not Specify The Required Information Is Not A "Notice To Appear," And Does Not Stop Accrual Of Continuous Residence.

The statutory language is crystal clear: Regardless what label DHS places on a particular document, that document is only a "notice to appear under section 1229(a)" if it includes the information listed in § 1229(a)'s definition of a "notice to appear." The BIA's contrary reading—which allows a document to end an immigrant's continuous residence based purely on the caption, not the contents—directly conflicts with the clear statutory text, and would lead to absurd results.

1. Congress left no ambiguity concerning what DHS needs to do to trigger the stop-time rule. Under that rule, an immigrant's "continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). This provision does not give DHS authority to define what constitutes a notice to appear that triggers the stop-time rule. Instead, by its clear terms, the statute triggers the stop-time rule only on service of a "notice to appear *under section 1229(a)*."

Section 1229(a) states that "in this section," the term "notice to appear" means "written notice . . . specifying the following." 8 U.S.C. § 1229(a)(1). It then lists the precise information that must be included for a document to be a "notice to appear." This includes not only the "time and place at which the proceedings will be held," but also, among other things, the "acts or conduct alleged to be in violation

of the law," the "charges against the alien and the statutory provisions alleged to have been violated," the fact that the "alien may be represented by counsel," and the "consequences . . . of the failure, except under exceptional circumstances, to appear at such proceedings." *Id.* Nothing in § 1229(a) gives DHS the authority to redefine a notice to appear as anything other than written notice of *all* the information required by the statute.

Taken together, these two provisions unambiguously provide that the stop-time rule only ends an immigrant's period of continuous presence when the immigrant is served with written notice of the specific information listed in § 1229(a)(1). Only written notice of that information constitutes a "notice to appear under section 1229(a)."

The BIA and the court of appeals' attempt to find ambiguity in these straightforward provisions fail.[4] The BIA's primary reasoning was that the phrase "notice to appear under section 1229(a)" could be read to "merely specif[y] the document the DHS must serve on the alien to trigger the 'stop-time' rule," and not to "impose substantive requirements for a notice to appear to be effective in order for that trigger to occur." *Camarillo*, 25 I. & N. Dec. at 647.

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[4] The court of appeals was bound by this Court's precedent to hold that if the statute is ambiguous, the BIA's interpretation prevails even if it is not the best reading of the statute—and even though before the BIA's interpretation, the courts of appeals had unanimously come out the other way. On the merits, this Court would be free to revisit that methodological premise if necessary. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring).

The courts of appeals that agreed with the BIA's finding of ambiguity added little additional reasoning. The First Circuit in this case, for instance, reasoned that the "stop-time rule does not explicitly state that the date and time of the hearing must be included in a notice to appear in order to cut off an alien's period of continuous physical presence," and that the reference to a notice to appear "under § 1229(a)" "does not clearly indicate whether the rule incorporates the requirements of that section." Pet. App. 9a. The Sixth and Seventh Circuits adopted similar reasoning. *Wang*, 759 F.3d at 674; *Gonzalez-Garcia*, 770 F.3d at 434.

As the Third Circuit correctly recognized, this reasoning is directly at odds with the statutory text. Section 1229(a) defines a "notice to appear" as not just a document with a certain *title*, but as a document with specific *contents*. The BIA never explained how a "notice to appear under section 1229(a)" could be read to include a notice that does not satisfy the definition of a "notice to appear" under that section. Indeed, in an analogous context, this Court interpreted the phrase "adjudication under section 554" to "unambiguous[ly]" refer not to any agency proceeding of the general "type" addressed in 5 U.S.C. § 554, but only to a hearing meeting the specific requirements listed in that section. *Ardestani v. INS*, 502 U.S. 129, 134-36 (1991). Similarly here, Congress left no interpretive gap for the BIA to fill—it made clear that the stop-time trigger is service of written notice that includes the information specified in § 1229(a)'s definition.

2. The BIA's interpretation would lead to unreasonable results that Congress could not have intend-

ed. As the Third Circuit explained, the BIA's interpretation would mean that any document DHS labeled a "notice to appear" would trigger the stop-time rule, regardless whether that document provided *any* of the information listed in § 1229(a)(1), or even any information at all. *Orozco-Velasquez*, 817 F.3d at 84 ("Taken to its logical conclusion, the agency's approach might treat even a 'notice to appear' containing no information whatsoever as a 'stop-time' trigger."). Section 1229(a)(1) lists information vital to an immigrant's ability to meaningfully appear at a hearing—for instance, "the charges against the alien and the statutory provisions alleged to have been violated," or the fact that the "alien may be represented by counsel," not to mention the "time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1). Far from disputing that its interpretation would allow DHS to trigger the stop-time rule by service of a notice to appear that included none of this information, the BIA described its reading of the statute as one that "does not impose substantive requirements for a notice to appear" to trigger the stop-time rule. *Camarillo*, 25 I. & N. Dec. at 647.

The BIA's non-substantive interpretation of a "notice to appear" makes no sense given the text Congress chose. Congress specifically triggered the stop-time rule on service of a "notice to appear *under section 1229(a)*," a section that defines that term to have a particular substantive meaning. And even the phrase "notice to appear" itself implies that the notice have *some* content—at the very least, notice of when, where, or why the immigrant was supposed to "appear."

Notably, several of the courts of appeals that deferred to the BIA were unwilling to accept these implications of the BIA's rule, and kept open the possibility that, if DHS omitted some other, unspecified information, the written notice would not trigger the stop-time rule. *E.g.*, Pet. App. 8a-9a n.5; *Urbina*, 745 F.3d at 740 ("We do not decide today whether a more egregious case might warrant a different result."); *Guaman-Yuqui*, 786 F.3d at 241 n.3 ("We have no occasion to address in this case whether other deficiencies in a notice to appear may preclude that notice from triggering the stop-time rule."). But none of these courts provided any explanation for distinguishing among the substantive requirements in § 1229(a)'s definition of a "notice to appear"—none explained, for instance, why written notice that omitted the "time and place" of the hearing should be treated any differently than written notice that omitted the "charges against the alien and the statutory provisions alleged to have been violated." 8 U.S.C. § 1229(a)(1)(D), (G)(i). Nothing in the statute gives the BIA (or the courts of appeals) the authority to pick and choose which requirements from the notice-to-appeal definition DHS can ignore while still triggering the stop-time rule.

3. The First Circuit and other courts of appeals erred in relying on this Court's holding in *Becker* that the Federal Rules of Civil Procedure allow an appellant to cure the failure to sign a notice of appeal. *See* Pet. App. 8a; *Gonzalez-Garcia*, 770 F.3d at 435; *Wang*, 759 F.3d at 674. *Becker* does not stand for the broad proposition that defective documents are effective because "a defective document nonetheless serves a useful purpose." *Wang*, 759 F.3d at 674; *see also* Pet. App. 8a. Instead, *Becker* was based on

an explicit provision in the Federal Rules that allows a party to promptly correct a specific defect, a failure to sign a document. 532 U.S. at 764 (citing Fed. R. Civ. P. 11(a)). Congress included no such provision in the stop-time rule. The BIA and courts do not have authority to decide when a document serves a sufficiently "useful purpose" to trigger the stop-time rule when Congress specified exactly what information a document must contain to trigger that rule.

B. Traditional Tools Of Statutory Interpretation Confirm The Statute's Unambiguous Text.

Normal tools of statutory interpretation, like statutory structure and legislative history, confirm that the plain reading of the statute's unambiguous text is the right one. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017) ("normal tools of statutory interpretation" apply at *Chevron*'s first step).

1. The statutory structure supports the Third Circuit's interpretation. As the BIA and the First Circuit correctly recognized, the stop-time rule refers to a notice to appear "under section 1229(a)" generally, not 1229(a)(1) specifically. *Camarillo*, 25 I. & N. Dec. at 647-48; Pet. App. 11a. Within § 1229(a), paragraph (1) requires and defines a "notice to appear," and paragraph (2) provides procedures for notifying an immigrant of a "change in time or place of proceedings."

These provisions support interpreting the stop-time rule to end a period of continuous residence only upon service of a complete notice to appear. Section 1229b(d)(1) refers to a "notice to appear under section 1229(a)," and a "notice to appear" is only defined

in paragraph (1). That paragraph (2) includes provisions for *changing* the time of the proceedings only emphasizes that a notice to appear as defined in paragraph (1) must include the time of the proceedings—if it did not, then there would be nothing to "change" under paragraph (2).

The BIA and First Circuit's contrary reading misunderstands the statute's structure. The BIA claimed the structure supports its counter-textual reading because it shows that "Congress envisioned that circumstances beyond the control of the DHS would require a change in the hearing date and specifically provided that such notification could occur after the issuance of the notice to appear." *Camarillo*, 25 I. & N. Dec. at 647-48. That is true, but irrelevant. The fact that the statute allows hearing dates to be changed does not diminish the fact that it *also* requires that a notice to appear include the date when the immigrant is currently scheduled to appear. The First Circuit concluded that it would make "little sense" to trigger the stop-time rule "on the fulfillment of all of the requirements of § 1229(a), which include . . . notification of any subsequent changes to that date and time under § 1229(a)(2)." Pet. App. 11a. This argument attacks a straw man, as no one has argued that notice of a change in the time or place of a hearing under § 1229(a)(2) has any impact on the stop-time rule, so long as DHS served a complete notice to appear in the first place.

2. The legislative history supports interpreting the stop-time rule to end a period of continuous presence only once the government serves written notice of all of the information required by § 1229(a). Congress adopted the stop-time rule to prevent *immi-*

grants from using procedural maneuvers to delay proceedings and accrue the required period of presence or residence; Congress did not intend to end the period of continuous residence when *the government* delays the commencement of removal proceedings by failing to schedule and serve notice of a hearing.

The immigration laws have long provided the government with discretion to allow certain immigrants, those who had been in the country for a certain period, to remain in the United States even if they were otherwise inadmissible or deportable. *See, e.g.*, Immigration Act of 1917, § 3, proviso 7, 39 Stat. 878. The current cancellation–of removal provision is the latest version of this long-recognized discretionary form of relief. *See* H.R. Rep. No. 104-469, pt. I, at 231-33 (1996).

The stop-time rule was intended to address a very specific problem with these provisions: Because the immigrants continued to accrue residence during removal proceedings, immigrants had an incentive to obstruct and delay those proceedings to obtain the necessary period of continuous residence and apply for relief. As the BIA explained, this loophole allowed "aliens in deportation proceedings [to] knowingly file[] meritless applications for relief or otherwise exploit[] administrative delays in the hearing and appeal processes in order to 'buy time,' during which they could acquire a period of continuous presence that would qualify them for forms of relief that were unavailable to them when proceedings were initiated." *Cisneros-Gonzalez*, 23 I. & N. Dec. at 670; *see also* H.R. Rep. No. 104-469, pt. I, at 121-122 (noting that noncitizens sought to "abuse[]" the

earlier laws by "seeking to delay proceedings until [the required residence period] has accrued").

Congress could have closed this loophole in many ways. For instance, it could have ended any period of continuous residence at the first removal hearing, or when the immigrant was first detained by immigration authorities.

Instead, as the statute's text demonstrates, Congress struck a particular balance: It gave DHS power to stop an immigrant's period of continuous residence, but only if DHS provides the immigrant with the specific information identified in the statute. This makes sense given the legislative history, which demonstrates longstanding Congressional intent to provide discretionary relief when an immigrant has been allowed to stay in the country based on government inaction, but to prevent *immigrants* from artificially delaying proceedings to become cancellation-eligible.

The BIA misconstrued this legislative history. It concluded that the legislative history supports its reading because a "primary purpose of a notice to appear," according to the BIA, "is to inform an alien that the Government intends to have him or her removed from the country," which can be accomplished without strictly following § 1229(a)(1). *Camarillo*, 25 I. & N Dec. at 650. Nothing in the legislative history, however, suggests that Congress wanted to trigger the stop-time rule any time the government informed an immigrant that it intended to have her removed—and even if it did, the statute's text explicitly rejects that reading of the statute. What the legislative history shows is just that Congress wanted to give the government the power to end the period of

continuous residence, which it did by allowing the government to trigger the stop-time rule by serving written notice of the information identified in § 1229(a)'s definition of a notice to appear.

The First Circuit relied on a different part of the legislative history that did not address the stop-time rule, but addressed separate provisions simplifying the notice provisions by creating the notice to appear. Pet. App. 13a-14a. As the First Circuit recognized, Congress's goal in creating the notice to appear was to avoid protracted disputes concerning whether the immigrant was properly served a hearing notice. Pet. App. 13a-14a. One mechanism Congress used was to require immigrants to update the government of their address when they moved. *Id.* But there was another important change the First Circuit ignored: while including the time of the removal hearing was optional in the earlier "order to show cause," Congress made it mandatory in the "notice to appear," thus consolidating notice procedures. *See* Immigration Act of 1990, § 545(a), Pub. L. No. 101-649, 104 Stat. 4978, 5061-62; 8 U.S.C. § 1229(a).

The legislative history of these simplified notice provisions undermines the BIA's interpretation of the statute. Though the First Circuit was correct that these provisions were intended to "prevent notice problems from dragging out the deportation process," Pet. App. 14a, the mechanism Congress selected to solve that problem was to *require that the date and time of the hearing be included in a notice to appear*. The First Circuit's conclusion that Congress would not have triggered the stop-time rule "on receipt of a hearing notice that may come months, or even years, after the initiation of deportation pro-

ceedings by DHS" thus makes no sense, as Congress specifically instructed that a hearing notice be included in the notice to appear itself.

In sum, the legislative history demonstrates Congress's concern with allowing immigrants to artificially delay removal proceedings to obtain eligibility for relief. Nothing in that history suggests that Congress intended to end eligibility for immigrants when delay is due to DHS's failure to promptly and properly serve notice of the specific information that constitutes a "notice to appear under section 1229(a)."

C. The BIA's Counter-Textual Reading Cannot Be Justified By Reference To The "Administrative Context."

The BIA and the First Circuit sought to justify their counter-textual statutory interpretation based on a desire to "accommodate the[] practical constraints" imposed by the "administrative context." Pet. App. 12a; *Camarillo*, 25 I. & N. Dec. at 648. As an initial matter, the BIA and First Circuit cannot ignore the statute's text because "practical constraints" make it difficult for DHS to trigger the stop-time rule. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. The statute unambiguously triggers the stop-time rule on service of a particular document, and the BIA cannot deviate from that text, no matter how convenient such a deviation may be for DHS's administrative practice.

The BIA and First Circuit's accommodation of DHS's regulations is particularly inappropriate given

the nature of the regulation on which the BIA and First Circuit relied. That regulation, 8 C.F.R. § 1003.18(b), states that DHS "shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, *where practicable*." (Emphasis added). The regulation goes on to state that if that information is not included in the notice to appear, "the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place and date of hearing." *Id.* This regulation is in significant tension with the statute, which *requires* that a "notice to appear" specify the "time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i). There is no reason to misinterpret the stop-time rule to accommodate a regulation that makes optional what the statute makes mandatory.

Section 1003.18(b) may be defensible on the ground that § 1229(a) does not require that the notice to appear be served as one document; so long as the government serves an immigrant with written notice of the required information, it has arguably served a "notice to appear" under § 1229(a). Courts that have refused to dismiss removal proceedings initiated based on § 1003.18(b)'s "two-step notice procedure" have adopted precisely this reasoning. *Popa v. Holder*, 571 F.3d 890, 895-96 (9th Cir. 2009) (holding that "the NTA and the hearing notice combined provided Popa with the time and place of her hearing, as required by 8 U.S.C. § 1229(a)(1)(G)(i)"); *see also, e.g.*, *Dababneh v. Gonzales*, 471 F.3d 806, 810 (7th Cir. 2006) ("Dababneh received an effective NTA that met the § [1229(a)] requirements through receipt of both the NTA and the NOH.").

This defense of § 1003.18(b), however, implicitly recognizes that the government has not served a "notice to appear under section 1229(a)" until it has served *both* an incomplete notice to appear *and* a notice of hearing. Until that point, the government has not served written notice of the information that, taken together, constitutes a "notice to appear" as § 1229(a) defines that term. And so long as the government has not served a "notice to appear under section 1229(a)," the immigrant's period of continuous residence continues to run.

The fact that, according to the BIA and the First Circuit, it is often "not practical" to include the date and time on a notice to appear is thus irrelevant. DHS is free to use the two-step notice procedure in § 1003.18(b), but the consequence of that administrative practice is that the immigrant's period of continuous residence continues to run until both steps of the notice procedure are complete. If DHS is concerned about that delay in stopping the period of continuous residence, it can simply follow the statutory text and obtain a hearing date before it serves the notice to appear.

Nothing in the administrative context justifies the BIA's counter-textual statutory interpretation. It makes no sense to justify triggering the stop-time rule on service of statutorily-inadequate notice based on a DHS regulation that authorizes DHS to serve statutorily-inadequate notice.

III. This Case Is An Ideal Vehicle To Resolve The Circuit Conflict.

1. Throughout his removal proceedings, Mr. Pereira has preserved his argument that the notice he

received in 2006 was not a "notice to appear under section 1229(a)" because it did not specify the date and time of his hearing. He made the argument clearly to the IJ, A.R. 140-42, who rejected it in his oral decision and order, Pet. App. 23a. Mr. Pereira raised the argument again on appeal to the BIA, A.R. 14-17, which rejected the argument based on *Camarillo*, Pet. App. 18a. Mr. Pereira again preserved the issue in his petition for review at the First Circuit, which rejected Mr. Pereira's argument, explicitly disagreeing with the Third Circuit's decision, under which Mr. Pereira would have been eligible for cancellation of removal. Pet. App. 9a.

2. The question whether the 2006 written notice triggered the stop-time rule is dispositive of Mr. Pereira's eligibility for cancellation of review. It is undisputed that the written notice DHS served in 2006 is the only notice Mr. Pereira received until after he had accrued ten years of continuous presence in the United States. It is similarly undisputed that Mr. Pereira has two U.S. citizen daughters. *See id.* § 1229b(b)(1)(D). Mr. Pereira is a devoted father, and his removal would undoubtedly cause his daughters "exceptional and unusual hardship." *Id.* Mr. Pereira has demonstrated "good moral character," *see id.* § 1229(b)(1)(B), and has no disqualifying criminal convictions under § 1229b(b)(1)(C).

That the immigration court tried unsuccessfully to mail Mr. Pereira a hearing notice in 2007 is irrelevant. It is undisputed that Mr. Pereira never received that 2007 notice because the immigration court sent it to the wrong mailing address, through no fault of Mr. Pereira's. Pet. App. 3a; A.R. 133-34, 194-95. The government has thus appropriately

never argued that the immigration court's failed attempt to mail the 2007 notice had any impact on Mr. Pereira's eligibility for cancellation of removal.

3. Mr. Pereira has a strong case that the Attorney General should cancel his removal. Mr. Pereira is the breadwinner for his family, including his U.S.-citizen daughters, Maria and Keiry, who are four and eight years old. The record already includes significant evidence that Mr. Pereira not only supports his family financially, but is also a loving and active father, and a respected member of the community in Martha's Vineyard. Mr. Pereira could introduce significantly more evidence if granted the opportunity to apply for cancellation.

* * * * *

Had Mr. Pereira been brought into immigration court in Philadelphia, rather than Boston, he could apply for cancellation of removal, and likely remain in the United States with his family. This Court should not allow such geographic happenstance to determine the fate of families across the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVID J. ZIMMER
ALEXANDRA LU
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210

JEFFREY B. RUBIN
TODD C. POMERLEAU
RUBIN POMERLEAU PC
3 Center Plaza, Ste. 400
Boston, MA 02108

WILLIAM M. JAY
Counsel of Record
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinlaw.com
(202) 346-4000

Counsel for Petitioner

APPENDIX

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 16-1033

WESCLEY FONSECA PEREIRA,

Petitioner,

v.

JEFFERSON B. SESSIONS III,*
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

Before

Lynch, Lipez, and Thompson,
Circuit Judges.

Jeffrey B. Rubin, with whom Rubin Pomerleau P.C. was on brief, for petitioner.

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* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Jefferson B. Sessions III has been substituted for former Attorney General Loretta E. Lynch as respondent.

Sarah K. Pergolizzi, Trial Attorney, Office of Immigration Litigation, with whom Bejamin C. Mizer, Acting Assistant Attorney General, Civil Division, Kohsei Ugumori, Senior Litigation Counsel, Office of Immigration Litigation, and Jesse D. Lorenz, Trial Attorney, Office of Immigration Litigation, were on brief, for respondent.

July 31, 2017

LIPEZ, Circuit Judge. The Immigration and Nationality Act ("INA") gives the Attorney General discretion to cancel the removal of a non-permanent resident alien if the alien meets certain criteria, including ten years of continuous physical presence in the United States. 8 U.S.C. § 1229b(b)(1). Under the "stop-time" rule, the alien's period of continuous physical presence ends "when the alien is served a notice to appear under section 1229(a)" of the INA. *Id.* § 1229b(d)(1). In this case, we must decide whether a notice to appear that does not contain the date and time of the alien's initial hearing is nonetheless effective to end the alien's period of continuous physical presence. The Board of Immigration Appeals ("BIA") answered this question affirmatively in *Matter of Camarillo*, 25 I. & N. Dec. 644 (B.I.A. 2011). The BIA applied that rule in this case.

Joining the majority of circuit courts to address this issue, we conclude that the BIA's decision in *Camarillo* is entitled to *Chevron* deference. We deny the petition for review.

I.

Wescley Fonseca Pereira ("Pereira"), a native and citizen of Brazil, was admitted to the United States in June 2000 as a non-immigrant visitor authorized to stay until December 21, 2000. He overstayed his visa. In May 2006, less than six years after Pereira entered the country, the Department of Homeland Security ("DHS") personally served him with a notice to appear. The notice did not specify the date and time of his initial removal hearing, but instead ordered him to appear before an Immigration Judge ("IJ") in Boston "on a date to be set at a time to be set." More than a year later, DHS filed the notice to appear with the immigration court, and the court mailed Pereira a notice setting his initial removal hearing for October 31, 2007 at 9:30 A.M. Because the notice was sent to Pereira's street address on Martha's Vineyard rather than his post office box, however, he never received it.[1] When Pereira failed to appear at the hearing, an IJ ordered him removed in absentia.

Pereira was not removed, however, and he remained in the country. In March 2013, more than five years later, Pereira was arrested for a motor vehicle violation and detained by DHS. Pereira retained an attorney, who filed a motion to reopen his removal proceedings, claiming that Pereira had never received the October 2007 hearing notice. After an IJ allowed the motion, Pereira conceded removability, but sought relief in the form of

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[1] According to Pereira, such a problem is not uncommon for residents of Martha's Vineyard, who often receive mail through a post office box rather than at their home addresses.

cancellation of removal under 8 U.S.C. § 1229b(b)(1).[2] Arguing that the notice to appear was defective because it did not include the date and time of his hearing, Pereira contended that it had not "stopped" the continuous residency clock. He asserted that he had instead continued to accrue time for the purpose of § 1229b(b)(1) until he received a notice of the hearing that occurred after his case was reopened in 2013.

The IJ pretermitted Pereira's application for cancellation of removal, finding that Pereira could not establish the requisite ten years of continuous physical presence, and ordered him removed. Pereira appealed to the BIA. On appeal, he conceded that *Camarillo* foreclosed his argument that the stop-time rule did not cut off his period of continuous physical presence until 2013, but argued that *Camarillo* should be reconsidered and overruled. The BIA declined to reconsider *Camarillo* and affirmed the IJ's decision, holding that the notice to appear was effective under the stop-time rule despite the missing details concerning the date and time of his hearing.[3] Pereira timely filed a petition for review with this court.

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[2] Pereira also applied for voluntary departure, a request that he later withdrew. In addition, he asked DHS to exercise its prosecutorial discretion to allow him to remain in the country with his wife and two American citizen daughters. DHS denied that request.

[3] Pereira also asked the BIA to administratively close his case, or to remand it to the IJ to consider termination or administrative closure while he submitted a second application to DHS seeking prosecutorial discretion, this time pursuant to a recently announced program. The BIA denied Pereira's request,

II.

A. Standard of Review

Because "the BIA adopted and affirmed the IJ's ruling, and discussed some of the bases for the IJ's opinion, we review both the BIA's and IJ's opinions." *Idy v. Holder*, 674 F.3d 111, 117 (1st Cir. 2012). Where, as here, the case presents a question of statutory interpretation, we review the BIA's legal conclusions de novo, but give "appropriate deference to the agency's interpretation of the underlying statute in accordance with administrative law principles." *Id.* (quoting *Gailius v. INS*, 147 F.3d 34, 43 (1st Cir. 1998)). Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, we first look to the statutory text to ascertain whether "Congress has directly spoken to the precise question at issue." 467 U.S. 837, 842 (1984). If the statute addresses the question at issue and is clear in its meaning, then we "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, the statute is silent or ambiguous, we determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. We defer to an agency's construction of an ambiguous statutory provision "unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Saysana v. Gillen*, 590 F.3d 7, 13 (1st Cir. 2009) (quoting *Chevron*, 467 U.S. at 844).

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stating that DHS had sole authority over prosecutorial discretion decisions and that prosecutorial discretion did not, therefore, provide a basis upon which the BIA could remand or administratively close the case.

B. Analysis

1. *Chevron* Step One: Ambiguity of the Statute

To qualify for cancellation of removal, an alien must meet several criteria, including a showing that he "has been physically present in the United States for a continuous period of not less than 10 years." 8 U.S.C. § 1229b(b)(1)(A). We focus on the language of the stop-time rule, 8 U.S.C. § 1229b(d)(1), which cuts off that period of physical presence "when the alien is served a notice to appear under section 1229(a)."[4]

The referenced provision, § 1229(a), contains three subsections, the first of which states:

> In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following: . . . .

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[4] The full text of the provision reads:

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

8 U.S.C. § 1229b(d)(1).

Id. § 1229(a)(1). That subsection goes on to specify ten items, including the charges against the alien, the alien's alleged illegal conduct, and "[t]he time and place at which the proceedings will be held." *Id.* The second subsection provides a procedure for notifying the alien in the event of a change in the time or place of the initial removal hearing. *See id.* § 1229(a)(2). The third subsection directs the Attorney General to "create a system to record and preserve" the addresses and telephone numbers of aliens who have been served with notices to appear. *Id.* § 1229(a)(3).

Pereira argues that the stop-time rule's reference to "a notice to appear under § 1229(a)" unambiguously requires that the notice include all of the information specified in § 1229(a)(1), including the date and time of the initial removal hearing. Otherwise, he claims, the notice is not, in fact, a "notice to appear," and it cannot trigger the stop-time rule. According to Pereira, however, all ten items listed in § 1229(a)(1) need not be provided in the same document. Instead, two or more documents that together contain all ten items (such as the notice served on Pereira in 2006 and the hearing notice he received in 2013) could, in combination, serve as a "notice to appear." In that case, the stop-time rule would not be triggered until both documents had been served on the alien.

For support, Pereira cites a recent decision by the Third Circuit, which found that the language of § 1229b(d)(1) unambiguously requires that the date and time of the hearing be provided before the stop-time rule is triggered. *See Orozco-Velasquez v. Att'y*

Gen. United States, 817 F.3d 78, 81-82 (3d Cir. 2016). The court relied upon § 1229(a)(1)'s commandment that a notice to appear specifying the ten pieces of information listed "*shall* be given in person to the alien." *Id.* at 83. Explaining that the word "shall" "conveys a mandatory rather than a hortatory instruction," the court concluded that only a notice or set of notices that "conveys the *complete* set of information prescribed by § 1229(a)(1)" could "stop the continuous residency clock." *Id.*

The word "shall," however, appears in § 1229(a)(1), not in the stop-time rule itself. It is undisputed that § 1229(a)(1) creates a duty requiring the government to provide an alien with the information listed in that provision. But whether a notice to appear that omits some of this information nonetheless triggers the stop-time rule is a different question. As the Seventh Circuit has observed, even if such an omission renders a notice to appear defective, "a defective document [may] nonetheless serve[] a useful purpose." *Wang v. Holder*, 759 F.3d 670, 674 (7th Cir. 2014); *see also Gonzalez-Garcia v. Holder*, 770 F.3d 431, 435 (6th Cir. 2014) (quoting *Wang*, 759 F.3d at 674). In *Becker v. Montgomery*, the Supreme Court held that an unsigned notice of appeal could qualify as timely filed, even if the missing signature was not provided within the filing period. 532 U.S. 757, 760 (2001). Here, just as there, the missing item may be a "curable" defect that does not prevent the notice from serving its purpose.[5]

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[5] Pereira also cites *Orozco-Velasquez* for the argument that "[t]aken to its logical conclusion, the agency's approach might treat even a 'notice to appear' containing no information

We thus disagree with the Third Circuit's holding that the stop-time rule unambiguously incorporates the requirements of § 1229(a)(1). The stop-time rule does not explicitly state that the date and time of the hearing must be included in a notice to appear in order to cut off an alien's period of continuous physical presence. *See* 8 U.S.C. § 1229b(d)(1). Moreover, the rule's reference to a notice to appear "under" § 1229(a) does not clearly indicate whether the rule incorporates the requirements of that section. *See id.* Thus, we find the statutory language of the stop-time rule ambiguous. Pereira cannot, therefore, prevail at the first step of the *Chevron* inquiry, and we must proceed to step two.

2. *Chevron* Step Two: Permissibility of the Agency's Interpretation

The BIA's decision in this case relied on its precedential opinion in *Camarillo*, in which the BIA announced its position on the statutory question we face here. *See* 25 I. & N. Dec. at 645. Finding more than one plausible interpretation of the stop-time rule, the BIA in *Camarillo* determined that the statutory language was ambiguous. *Id.* at 647. The agency explained that, instead of incorporating the

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whatsoever as a 'stop-time' trigger." 817 F.3d at 84. Because the facts of this case involve only an initially omitted, but later provided, hearing date, and the BIA's opinion made no assertions about the extension of *Camarillo* to other contexts, this case does not require us to define the boundaries of our deference to the agency's statutory construction of the applicable provisions. *See, e.g., Lopez-Soto v. Hawayek*, 175 F.3d 170, 177 (1st Cir. 1999) (explaining that the facts of the case presented "no occasion to address . . . looming issues" that might become relevant in other contexts).

requirements of § 1229(a) as Pereira suggests here, the rule's reference to "a notice to appear under section 1229(a)" could also be construed as "simply definitional." *Id.* That is, the reference may "merely specif[y] the document the DHS must serve on the alien to trigger the 'stop-time' rule," without "impos[ing] substantive requirements for a notice to appear to be effective" in triggering that rule. *Id.*

After examining the structure of the statute, the administration of the statute's requirements, and the statute's legislative history, the agency concluded that the "definitional" construction of the stop-time rule was the better reading. *Id.* at 651. The BIA applied that holding from *Camarillo* in this case. We are obligated to defer to the BIA as long as its chosen construction is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 457 U.S. at 844. We thus must determine whether the BIA adopted a permissible construction of the stop-time rule.

a. Statutory Structure

In *Camarillo*, the agency began its analysis by examining the structure of the INA and, more specifically, the relevant provisions. It noted that § 1229(a) is "the primary reference in the [INA] to the notice to appear," and that this section defines the term "notice to appear." *Camarillo*, 25 I. & N. Dec. at 647. Thus, the BIA explained, it seems logical that Congress would reference § 1229(a) "to specify the document the DHS must serve on the alien to trigger the 'stop-time' rule," supporting a "definitional" reading of the reference. *Id.*

Looking to the language of the stop-time rule, the BIA then noted that the rule refers not just to § 1229(a)(1), the provision specifying the information that must be included in a notice to appear, but instead it broadly references the entirety of § 1229(a). *Id.*; *see also* 8 U.S.C. § 1229b(d)(1). As noted above, the second subsection of § 1229(a) "outlin[es] the procedures [for DHS] to follow when notice must be given" of changes in the date or time of the initial removal hearing. *Camarillo*, 25 I. & N. Dec. at 647-48; *see also* § 1229(a)(2). This provision "clearly accounts for [the] reality" that such details "are often subject to change," and "indicates that Congress envisioned that . . . notification [of a change in hearing date] could occur after the issuance of the notice to appear." *Camarillo*, 25 I. & N. Dec. at 647-48.

We agree with the thrust of the BIA's reasoning. It would make little sense for the stop-time rule's reference to "a notice to appear under section 1229(a)" to condition the triggering of the rule on the fulfillment of all of the requirements of § 1229(a), which include not just notification of the initial date and time of the removal hearing under § 1229(a)(1), but also notification of any subsequent changes to that date and time under § 1229(a)(2).[6]

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[6] Notably, Pereira neither addresses whether the stop-time rule incorporates § 1229(a)(2) and (a)(3), nor argues that the rule somehow incorporates only the requirements of § 1229(a)(1).

b. Administrative Context

The BIA further reasoned that the "definitional" approach best accords with the process through which enforcement proceedings are initiated. While DHS drafts and serves the notice to appear, the immigration court sets the date and time of the hearing. *See id.* at 648, 650; *see also* 8 C.F.R. § 1003.18. The BIA observed that because "DHS frequently serves [notices to appear] where there is no immediate access to docketing information," *Camarillo*, 25 I. & N. Dec. at 648 (alteration in original) (quoting *Dababneh v. Gonzales*, 471 F.3d 806, 809 (7th Cir. 2006)), "it is often not practical to include the date and time of the initial removal hearing on the notice to appear," *id.* An interpretation of the statute that allows the stop-time rule to take effect without requiring separate action by the immigration courts would, therefore, accommodate these practical constraints.

c. Legislative History

The BIA also relied upon the legislative history of the stop-time rule. The rule was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, which amended various portions of the INA. Before the enactment of the stop-time rule, the agency explained, "[an] otherwise eligible person could qualify for suspension of deportation [now known as "cancellation of removal"] if he or she had been continuously physically present in the United States for [the requisite period], regardless of whether or when the Immigration and Naturalization Service had initiated deportation

proceedings against the person through the issuance of" the document that, at that time, served as a notice to appear. *Camarillo*, 25 I. & N. Dec. at 649-50 (first alteration in original) (quoting *Matter of Nolasco*, 22 I. & N. Dec. 632, 640 (B.I.A. 1999) (quoting 143 Cong. Rec. S12265, S12266 (daily ed. Nov. 9, 1997))). "[T]he 'stop-time' rule was enacted to address 'perceived abuses arising from'" this legal loophole by "prevent[ing] aliens from being able 'to "buy time[]" [through tactics such as requesting multiple continuances,] during which they could acquire a period of continuous presence that would qualify them for forms of relief that were unavailable to them when proceedings were initiated.'" *Id.* at 649 (quoting *Matter of Cisneros*, 23 I. & N. Dec. 668, 670 (B.I.A. 2004) (quoting H.R. Rep. 104-469, pt. I, at 122 (1996))). Thus, the BIA concluded, "Congress intended for the 'stop-time' rule to break an alien's continuous physical residence or physical presence in the United States when . . . DHS[] serves the charging document," regardless of whether that document contains a hearing date. *Id.* at 650.

The legislative history reflects Congress's concern about delay and inefficiency in the immigration process that it sought to address through the enactment of IIRIRA. Specifically, a report of the Judiciary Committee of the House of Representatives notes that "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings [had led] some immigration judges to decline to exercise their authority to order an alien deported in absentia." H.R. Rep. 104-469, pt. I, at 122. The creation of the "notice to appear" was intended to prevent "protracted disputes concerning

whether an alien has been provided proper notice of a proceeding" by informing aliens that they are required to notify the government of any changes in their contact information. *Id.* at 159; *see* 8 U.S.C. § 1229(a)(1)(F) (stating that a notice to appear shall include "[t]he requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted" and "[t]he requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number"). Given Congress's intent in enacting IIRIRA to prevent notice problems from dragging out the deportation process, it would make little sense for Congress to have created the potential for further delays by conditioning the activation of the stop-time rule on the receipt of a hearing notice that may come months, or even years, after the initiation of deportation proceedings by DHS.

d. Conclusion

In light of the relevant text, statutory structure, administrative context, and legislative history, the BIA's construction of the stop-time rule is neither arbitrary and capricious nor contrary to the statute. *See Chevron*, 467 U.S. at 844. It is thus a permissible construction of the statute to which we defer.[7] *See id.* In so holding, we join five other

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[7] To the extent the government suggests that our holding is dictated by *Cheung v. Holder*, 678 F.3d 66 (1st Cir. 2012), Pereira correctly points out that the notice to appear in that case was not alleged to have omitted any of the required information. Instead, Cheung addressed the application of the

circuits that have granted *Chevron* deference to the BIA's interpretation in published opinions.[8] *See Guaman-Yuqui v. Lynch*, 786 F.3d 235, 240 (2d Cir. 2015) (per curiam); *Moscoso-Castellanos v. Lynch*, 803 F.3d 1079, 1083 (9th Cir. 2015);[9] *Gonzalez-Garcia*, 770 F.3d at 43435; *Wang*, 759 F.3d at 675; *Urbina v. Holder*, 745 F.3d 736, 740 (4th Cir. 2014). *But see Orozco-Velasquez*, 817 F.3d at 82-83.

III.

Because we defer to the BIA's interpretation of the stop-time rule, we agree with the agency's conclusion that Pereira's period of continuous physical presence ended when he was served with a notice to appear in 2006. At that point, he had been present in the United States for less than six years. Unable to demonstrate the requisite ten years of physical presence, Pereira is ineligible for cancellation of

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stop-time rule when the government later withdraws the charges stated in the notice and substitutes a different set of charges. See 678 F.3d at 69. Thus, that precedent is not controlling.

[8] The Eleventh Circuit also granted the BIA's construction Chevron deference in an unpublished opinion, *see O'Garro v. U.S. Att'y Gen.*, 605 F. App'x 951, 953 (11th Cir. 2015) (per curiam), and accepted the BIA's construction without conducting a Chevron analysis in *Hernandez-Rubio v. U.S. Att'y Gen.*, 615 F. App'x 933, 934 (11th Cir. 2015) (per curiam).

[9] Pereira cites *Garcia-Ramirez v. Gonzales*, a pre-*Camarillo* case in which the Ninth Circuit held, in a footnote, that the petitioner's period of continuous physical presence did not end until she was served with a notice containing the date and time of her hearing. 423 F.3d 935, 937 n.3 (9th Cir. 2005) (per curiam). Because that court later afforded *Chevron* deference to the BIA's interpretation in *Camarillo*, however, *Garcia-Ramirez* no longer states the applicable law in the Ninth Circuit. *See Moscoso-Castellanos*, 803 F.3d at 1082 n.2.

removal under 8 U.S.C. § 1229b(b)(1). The petition for review is denied.

So ordered.

APPENDIX B

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A096416756 - Boston, MA

Date: Dec. 8, 2015

In re: WESCLEY FONSECA-PEREIRA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jeffrey B. Rubin, Esquire

APPLICATION: Cancellation of removal under section 240A(b)

The respondent, a native and citizen of Brazil, has appealed from the Immigration Judge's July 10, 2014, decision pretermitting his application for cancellation of removal under section 240A(b)(l) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(l). The appeal will be dismissed.

The Board defers to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application

of a particular standard of law to those facts. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

We agree with the Immigration Judge that the respondent is ineligible for cancellation of removal, inasmuch as he has not established the requisite 10 year period of continuous physical presence. *See Matter of Camarillo,* 25 I&N Dec. 644 (BIA 2011) (holding that an alien's period of continuous physical presence for cancellation of removal is deemed to end upon the service of the Notice to Appear even if the Notice to Appear does not include the date and time of the hearing). The Notice to Appear states that the respondent was admitted into the United States on June 22,2000, and it was personally served on May 31,2006. Hence, the respondent lacks the requisite period of continuous physical presence for cancellation of removal. *See Matter of Camarillo, supra.* On appeal, the respondent argues that the stop-time rule does not apply to these proceedings because the Notice to Appear lacks the date and time of his hearing and that *Matter of Camarillo* was wrongly decided. We decline to reconsider *Matter of Camarillo,* and affirm the Immigration Judge's determination that the respondent is ineligible for cancellation of removal.

In addition, the respondent argues on appeal that these proceedings should be remanded or administratively closed to apply for deferred action. A request for a favorable exercise of prosecutorial discretion must be directed to the Department of Homeland Security, who has sole authority over such a request, and is not an appropriate basis here to remand or administratively close these proceedings.

See Matter of Avetisyan, 25 I&N Dec. 688 (BIA *2012); Matter of Yauri,* 25 I&N Dec. 103 (BIA 2009).

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

Brian M. O'Leary
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW UNITED STATES IMMIGRATION COURT BOSTON, MASSACHUSETTS

File: A096-416-756 July 10, 2014

In the Matter of

WESCLEY FONSECA PEREIRA	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE:	Section 237(a)91)(B) of the Immigration and Nationality Act - remained longer than permitted.
APPLICATION:	Permission to submit application for cancellation of removal as a nonpermanent resident.
ON BEHALF OF RESPONDENT:	ASHLEY M. EDENS Ruben Pomerleau, P.C. One Center Plaza; Suite 230 Boston, Massachusetts 02203
ON BEHALF OF DHS:	MARNA M. RUSHER, Assistant Chief Counsel JFK Federal Building - Room 425 Government Center Boston,

Massachusetts 02203

ORAL DECISION AND ORDERS OF THE IMMIGRATION JUDGE

The respondent in this case is a 33-year-old married native and citizen of Brazil. Removal proceedings were initiated against him when the Immigration Service of the Department of Homeland Security issued a Notice to Appear on May 31, 2006, charging him with being removable from the United States on the basis of the charge set forth above. (Exhibit 1).

At a hearing held before Judge D'Angelo of the Boston Immigration Court on October 31, 2007, the respondent failed to appear. Judge DAngelo issued an order of removal in absentia on that date.

On or about March 28, 2013, at a point in time after which the respondent had been arrested and detained by the Department of Homeland Security, his then attorney, Pauio J. Moura, submitted a motion to reopen the respondent's in absentia removal order. (Exhibits 3 and Group Exhibit 4).

Based upon the respondent's sworn statement that he had never received notice of his hearing and upon a review of the Record of proceedings, which reflected that the notice of the October 31, 2007, hearing had been returned to the Court, I reopened the respondent's case.

On May 8, 2013, the respondent appeared at a Master Calendar hearing with attorney Rubin from

the law firm which continues to represent the respondent. Written pleadings were submitted, which were subsequently updated to reflect that the respondent conceded the factual allegations and the charge of removability. Additionally, the respondent designated Brazil as the country for removal purposes if necessary. And further, he sought to apply for cancellation of removal as a nonpermanent resident. Additionally, he sought voluntary departure in the alternative and prosecutorial discretion. (Exhibit 5).

It was determined at the Master Calendar hearing on May 8, 2013, that the respondent at that time was not married and that he had two arrests for operating under the influence of alcohol. One of those arrests was in the year 2004 and the other in the year 2006. Based upon the fact that the respondent had been served with his Notice to Appear in hand on May 31, 2006, I determined that he was not eligible for cancellation of removal as a nonpermanent resident.

However, in the interest of humanitarian concern, I postponed his case for some 14 months in order to provide him with an opportunity to apply for prosecutorial discretion and also to see whether or not the Government might pass a new law that would protect him and somehow allow him to remain in the United States.

At a Master Calendar hearing held before me on July 9, 2014,1 was told that the respondent's application for prosecutorial discretion had been denied. Furthermore, of course, there has been no new Immigration legislation. I asked them whether

the respondent wanted to apply for voluntary departure and was advised by the attorney who was with him on that date that he still wanted to apply for cancellation of removal as a nonpermanent resident. The argument was that inasmuch as the Notice to Appear, albeit personally served on the respondent, did not have a date certain for him to come to Court, that somehow that would negate the service of the Notice to Appear insofar as it would cut off the respondent's continuous physical presence here.

I indicated that I did not believe that to be the law. But in order to err on the side of caution, I have put the case on for an Individual hearing today in order to hear the argument by the respondent's attorney. I believe the law is quite settled that DHS need not put a date certain on the Notice to Appear in order to make that document effective. I believe this to be an established law. However, the respondent's attorneys believe that that law is not appropriate or proper. Therefore, they have chosen to appeal my denial of the respondent's right to submit an application for cancellation of removal.

I acknowledge that there are backlog quotas having to do with the granting or denials of applications for cancellation of removal. However, the regulations provide that the Immigration Judge may deny an application when it appears that the respondent is simply statutorily ineligible to submit such an application. This I have determined to be the case.

All of that aside, the respondent appears to me to be a courteous and polite young man and apparently

he is now married and has two children. I do not believe that those factors provide him with a legal basis to remain in the United States, at least so far as the Immigration Court is concerned. That being the case and inasmuch as the respondent has withdrawn his application for voluntary departure, the following orders will be entered:

ORDERS

IT IS HEREBY ORDERED that the respondent's prospective application for cancellation of removal is pretermitted and denied as a matter of law.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Brazil on the basis of the charge contained in the Notice to Appear.

Please see the next page for electronic signature

LEONARD I. SHAPIRO
Immigration Judge

//s//

Immigration Judge LEONARD I. SHAPIRO

shapirol on November 19, 2014 at 3:38 PM GMT

APPENDIX D

8 U.S.C. § 1229b provides:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien-

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien-

(A) has been physically present in the United States for a continuous period of not less than

10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) Special rule for battered spouse or child

(A) Authority

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that-

(i) (I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who

is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent); or

(III) the alien has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the alien intended to marry, but whose marriage is not legitimate because of that United States citizen's or lawful permanent resident's bigamy;

(ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application, and the issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States;

(iii) the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C);

(iv) the alien is not inadmissible under paragraph (2) or (3) of section 1182(a) of this title, is not deportable under paragraphs (1)(G) or (2) through (4) of section 1227(a) of this title, subject to paragraph (5), and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

(B) Physical presence

Notwithstanding subsection (d)(2), for purposes of subparagraph (A)(ii) or for purposes of section 1254(a)(3) of this title (as in effect before the title 111—A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the alien demonstrates a connection between the absence and the battering or extreme cruelty perpetrated against the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2). If any absence or aggregate absences exceed 180 days, the absences or portions of the absences will not be considered to break the period of continuous presence. Any such period of time excluded from the 180-day limit shall be excluded in computing the time during which the alien has been physically present for purposes of the 3-year requirement set forth in this subparagraph, subparagraph (A)(ii), and section 1254(a)(3) of this title (as in effect before the title III—A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(C) Good moral character

Notwithstanding section 1101(f) of this title, an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of subparagraph (A)(iv) shall not bar the Attorney General from finding the alien to be of good moral character under subparagraph (A)(iii) or section 1254(a)(3) of this title (as in effect before the title III—A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.

(D) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

(3) Recordation of date

With respect to aliens who the Attorney General adjusts to the status of an alien lawfully admitted for permanent residence under paragraph (1) or (2), the Attorney General shall record the alien's lawful admission for permanent residence as of the

date of the Attorney General's cancellation of removal under paragraph (1) or (2).

(4) Children of battered aliens and parents of battered alien children

(A) In general

The Attorney General shall grant parole under section 1182(d)(5) of this title to any alien who is a-

(i) child of an alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III—A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); or

(ii) parent of a child alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III—A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(B) Duration of parole

The grant of parole shall extend from the time of the grant of relief under subsection (b)(2) or section 1254(a)(3) of this title (as in effect before the title III—A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to the time the application for adjustment of status filed by aliens covered

under this paragraph has been finally adjudicated. Applications for adjustment of status filed by aliens covered under this paragraph shall be treated as if the applicants were VAWA self-petitioners. Failure by the alien granted relief under subsection (b)(2) or section 1254(a)(3) of this title (as in effect before the title III—A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) may result in revocation of parole. ·

(5) Application of domestic violence waiver authority

The authority provided under section 1227(a)(7) of this title may apply under paragraphs (1)(B), (1)(C), and (2)(A) (iv) in a cancellation of removal and adjustment of status proceeding.

(6) Relatives of trafficking victims

(A) In general

Upon written request by a law enforcement official, the Secretary of Homeland Security may parole under section 1182(d)(5) of this title any alien who is a relative of an alien granted continued presence under section 7105(c)(3)(A) of title 22, if the relative-

(i) was, on the date on which law enforcement applied for such continued presence-

(I) in the case of an alien granted continued presence who is under 21 years of age, the spouse, child, parent, or unmarried sibling under 18 years of age, of the alien; or

(II) in the case of an alien granted continued presence who is 21 years of age or older, the spouse or child of the alien; or

(ii) is a parent or sibling of the alien who the requesting law enforcement official, in consultation with the Secretary of Homeland Security, as appropriate, determines to be in present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement, irrespective of age.

(B) Duration of parole

(i) In general

The Secretary may extend the parole granted under subparagraph (A) until the final adjudication of the application filed by the principal alien under section 1101(a)(15)(T)(ii) of this title.

(ii) Other limits on duration

If an application described in clause (i) is not filed, the parole granted under subparagraph (A) may extend until the later of-

(I) the date on which the principal alien's authority to remain in the United States under section 7105(c)(3) (A) of title 22 is terminated; or

(II) the date on which a civil action filed by the principal alien under section 1595 of title 18 is concluded.

(iii) Due diligence

Failure by the principal alien to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) of subparagraph (A), or in pursuing the civil action described in clause (ii)(II) (as determined by the Secretary of Homeland Security in consultation with the Attorney General), may result in revocation of parole.

(C) Other limitations

A relative may not be granted parole under this paragraph if-

(i) the Secretary of Homeland Security or the Attorney General has reason to believe that the relative was knowingly complicit in the trafficking of an alien permitted to remain in the United States under section 7105(c)(3)(A) of title 22; or

(ii) the relative is an alien described in paragraph (2) or (3) of section 1182(a) of this title or paragraph (2) or (4) of section 1227(a) of this title.

(c) Aliens ineligible for relief

The provisions of subsections (a) and (b)(1) shall not apply to any of the following aliens:

(1) An alien who entered the United States as a crewman subsequent to June 30, 1964.

(2) An alien who was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title, or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 1182(e) of this title.

(3) An alien who-

(A) was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101 (a)(15)(J) of this title or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training,

(B) is subject to the two-year foreign residence requirement of section 1182(e) of this title, and

(C) has not fulfilled that requirement or received a waiver thereof.

(4) An alien who is inadmissible under section 1182(a)(3) of this title or deportable under section 1227(a)(4) of this title.

(5) An alien who is described in section 1231(b)(3)(B)(i) of this title.

(6) An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 1254(a) of this title or who has been granted relief under section 1182(c) of this title, as such sections were in effect before September 30, 1996.

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

(2) Treatment of certain breaks in presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for

any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(3) Continuity not required because of honorable service in Armed Forces and presence upon entry into service

The requirements of continuous residence or continuous physical presence in the United States under subsections (a) and (b) shall not apply to an alien who-

(A) has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and

(B) at the time of the alien's enlistment or induction was in the United States.

(e) Annual limitation

(1) Aggregate limitation

Subject to paragraphs (2) and (3), the Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 1254(a) of this title (as in effect before September 30, 1996), of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such cancellation and adjustment, or such suspension and adjustment, and whether such an alien had previously applied for suspension of

deportation under such section 1254(a) of this title. The numerical limitation under this paragraph shall apply to the aggregate number of decisions in any fiscal year to cancel the removal (and adjust the status) of an alien, or suspend the deportation (and adjust the status) of an alien, under this section or such section 1254(a) of this title.

(2) Fiscal year 1997

For fiscal year 1997, paragraph (1) shall only apply to decisions to cancel the removal of an alien, or suspend the deportation of an alien, made after April 1, 1997. Notwithstanding any other provision of law, the Attorney General may cancel the removal or suspend the deportation, in addition to the normal allotment for fiscal year 1998, of a number of aliens equal to 4,000 less the number of such cancellations of removal and suspensions of deportation granted in fiscal year 1997 after April 1, 1997.

(3) Exception for certain aliens

Paragraph (1) shall not apply to the following:

(A) Aliens described in section 309(c)(5)(C)(i) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (as amended by the Nicaraguan Adjustment and Central American Relief Act).

(B) Aliens in deportation proceedings prior to April 1, 1997, who applied for suspension of deportation under section 1254(a)(3) of this title (as in effect before September 30, 1996).

8 U.S.C. § 1229 provides:

Initiation of removal proceedings

(a) Notice to appear

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F) (i) The requirement that the alien must immediately provide (or have provided) the

Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G) (i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying-

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

(3) Central address files

The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

(b) Securing of counsel

(1) In general

In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

(2) Current lists of counsel

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1229a of this title. Such lists shall be provided under subsection (a)(1)(E) and otherwise made generally available.

(3) Rule of construction

Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

(c) Service by mail

Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F).

(d) Prompt initiation of removal

(1) In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction.

(2) Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the

United States or its agencies or officers or any other person.

(e) Certification of compliance with restrictions on disclosure

(1) In general

In cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 1367 of this title have been complied with.

(2) Locations

The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization.

(B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of section 1101 (a)(15) of this title.

No. 17-459

In the Supreme Court of the United States

WESCLEY FONSECA PEREIRA, PETITIONER

v.

JEFFERSON B. SESSIONS III

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
ROBERT N. MARKLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

To be eligible for cancellation of removal under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who has not been admitted for permanent residence must establish, among other things, that he "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [his cancellation] application." 8 U.S.C. 1229b(b)(1)(A). Under the "stop-time rule," an applicant's period of continuous residence is "deemed to end * * * when the alien is served a notice to appear under section 1229(a)" of the INA, notifying him that removal proceedings are being initiated against him. 8 U.S.C. 1229b(d)(1). The question presented is as follows:

Whether a notice to appear issued under 8 U.S.C. 1229(a) must include a date and time certain for the alien's initial removal hearing to stop an alien's period of continuous physical presence for purposes of 8 U.S.C. 1229b(b)(1)(A).

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In the Supreme Court of the United States

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WESCLEY FONSECA PEREIRA, PETITIONER

v.

JEFFERSON B. SESSIONS III

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 866 F.3d 1. The opinions of the Board of Immigration Appeals (Pet. App. 17a-19a) and the immigration judge (Pet. App. 20a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2017. The petition for a writ of certiorari was filed on September 27, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who is admitted to the United States for a temporary period as a nonimmigrant but who remains longer than permitted is removable. See 8 U.S.C. 1227(a)(1)(B) and (C)(i). To effectuate such a removal, the Department of Homeland Security

(DHS) commences removal proceedings against the alien before an immigration judge (IJ), who decides the inadmissibility or deportability of the alien. See 8 U.S.C. 1229a. To apprise the alien of the government's initiation of removal proceedings against him, the INA provides that "written notice (in this section referred to as a 'notice to appear') shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any)." 8 U.S.C. 1229(a)(1).

Such a notice to appear must specify, among other things: (A) the "nature of the proceedings against the alien"; (B) the "legal authority under which the proceedings are conducted"; (C) the "acts or conduct alleged to be in violation of law"; (D) the "charges against the alien"; (E) that the "alien may be represented by counsel"; (F) that "the alien must immediately provide * * * the Attorney General with a written record of an address * * * at which the alien may be contacted" and "a written record of any change of the alien's address"; and (G) the "time and place at which the proceedings will be held." 8 U.S.C. 1229(a)(1). The notice must include a list of counsel, maintained by the Attorney General, who are available to represent aliens pro bono in removal proceedings. 8 U.S.C. 1229(a)(1)(E) and (b)(2). And "in the case of any change or postponement in the time and place," written notice must also be given indicating "the new time or place of the proceedings," unless "the alien has failed to provide the[ir] address" as instructed in paragraph (1)(F). 8 U.S.C. 1229(a)(2); see also 8 U.S.C. 1229(a)(3) (requiring the Attorney General to "create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F)").

Any alien who, after written notice has been provided, does not appear at the removal proceedings "shall be ordered removed in absentia if [DHS] establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." 8 U.S.C. 1229a(b)(5)(A). An in-absentia order may be rescinded only if the alien files a motion to reopen within 180 days demonstrating "exceptional circumstances" preventing him from appearing, 8 U.S.C. 1229a(b)(5)(C)(i), or, at any time, "if the alien demonstrates that [he] did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)" or that he was in federal or state custody and failed to appear "through no fault of [his own]," 8 U.S.C. 1229a(b)(5)(C)(ii).

b. The Attorney General may, in certain circumstances, cancel the removal of an alien determined to be removable. See 8 U.S.C. 1229b. This discretion to grant cancellation from removal is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yang*, 519 U.S. 26, 30 (1996) (citation omitted). To obtain cancellation of removal, the alien must demonstrate both that he is statutorily eligible for the relief he seeks and that he warrants a favorable exercise of discretion. 8 U.S.C. 1229a(c)(4)(A); 8 U.S.C. 1229b(b); 8 C.F.R. 1240.8(d); see, *e.g.*, *Guled* v. *Mukasey*, 515 F.3d 872, 879-880 (8th Cir. 2008).

To be statutorily eligible for cancellation of removal, an alien who is not a lawful permanent resident must: (1) have been physically present in the United States for a continuous period of at least ten years; (2) have been a person of good moral character during that period; (3) have not been convicted of certain designated crimes; and (4) establish that removal would result in

exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is either a citizen of the United States or a lawful permanent resident. 8 U.S.C. 1229b(b)(1)(A)-(D). Under what is often referred to as the "stop-time rule," an applicant's period of continuous physical presence is "deemed to end * * * when the alien is served a notice to appear under section 1229(a)." 8 U.S.C. 1229b(d)(1).

Whether an applicant warrants a favorable exercise of discretion depends on a balancing of "the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented [o]n his * * * behalf to determine whether the granting of . . . relief appears in the best interest of this country." *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998) (citation omitted).

2. a. Petitioner is a native and citizen of Brazil. Pet. App. 3a. In June 2000, he was admitted to the United States for a period of six months as a temporary nonimmigrant visitor. *Ibid.* He failed to honor the terms and conditions of his admission, remaining for years after its December 2000 expiration. *Ibid.* In May 2006, approximately six years after his arrival and about five-and-a-half years after his authorized period of admission had expired, petitioner was arrested for drunk driving. Administrative Record (A.R.) 39-42, 195. While in detention, DHS personally served him with a notice to appear (Form I-862). See Pet. App. 3a, 18a; A.R. 217-218 ("Notice to Appear").

The notice to appear informed petitioner that "removal proceedings under section 240 of the Immigration and Nationality Act[, 8 U.S.C. 1229a]," were being initiated against him. A.R. 217. It alleged that petitioner was removable for having remained in the United

States longer than authorized. *Ibid.* It indicated that he was "ordered to appear" for removal proceedings in the Boston immigration court "on a date to be set at a time to be set to show why [he] should not be removed from the United States." *Ibid.* (capitalization altered). It informed petitioner that, if he so chose, he could be represented by counsel in those proceedings, and it included a list of qualified attorneys who might be available to represent him pro bono. *Id.* at 218.

The notice listed petitioner's street address in Oak Bluffs, Massachusetts. A.R. 217. In accordance with Section 1229(a), it instructed petitioner: "You are required to provide the INS, in writing, with your full mailing address and telephone number," and "You must notify the Immigration Court immediately * * * whenever you change your address or telephone number during the course of this proceeding." *Id.* at 218.

Petitioner's hearing was later set for October 31, 2007, at 9:30 a.m. Six weeks prior to the hearing, the immigration court mailed a notice of hearing to the street address that was listed in the notice to appear. Pet. App. 3a; A.R. 216 ("Notice of Hearing"). Petitioner failed to appear at that hearing, however, and was ordered removed in absentia. Pet. App. 3a; A.R. 209.

b. Five-and-a-half years later, in March 2013, petitioner was again arrested, this time for driving on a suspended license, and detained by DHS. Pet. App. 3a; A.R. 43-45. Upon being informed of the in-absentia order, petitioner moved to reopen the removal proceedings based on his sworn statement that he had never received the notice of hearing indicating the date and time of the hearing because it had been mailed to his "physical residential address," not his "mailing address." Pet.

App. 3a; A.R. 194-195. The IJ granted petitioner's motion and reopened the proceedings. Pet. App. 3a; A.R. 194.

During the reopened proceedings, petitioner conceded he was removable as charged but sought relief in the form of cancellation of removal. Pet. App. 3a-4a; A.R. 147. He argued that he was eligible for cancellation because, among other things, he had been physically present in the United States since June 2000. Pet. App. 4a. He contended that the May 2006 notice to appear did not interrupt his accrual of the statutorily required ten years of continuous presence, because it did not include a date and time certain for his initial hearing. According to petitioner, the stop-time rule under 8 U.S.C. 1229b(d) did not "stop" his continuous physical presence until he received notice of the specific date and time of a hearing on his reopened removal proceedings in 2013. Pet. App. 4a.

c. The IJ denied petitioner's application for cancellation of removal and ordered that petitioner be removed, Pet. App. 20a-24a. The IJ reasoned that the omission of a date and time certain from the notice to appear did not "somehow * * * negate the service of the Notice to Appear insofar as it would cut off [petitioner's] continuous physical presence." *Id.* at 23a. Thus, the IJ determined, petitioner was "statutorily ineligible to submit [a cancellation of removal] application." *Ibid.*

d. The Board of Immigration Appeals (BIA) affirmed. Pet. App. 17a-19a. Relying on its precedential decision in *In re Camarillo*, 25 I. & N. Dec. 644 (2011), the BIA reasoned that "an alien's period of continuous physical presence for cancellation of removal is deemed to end upon service of the Notice to Appear even if the Notice to Appear does not include the date and time of

the hearing." Pet. App. 18a. Because petitioner was personally served with a notice to appear in May 2006, less than ten years after he was admitted into the United States, the Board determined that he "lack[ed] the requisite period of continuous physical presence for cancellation." *Ibid.* The Board declined to reconsider its decision in *Camarillo*, *ibid.*, and dismissed petitioner's appeal, *id.* at 19a.

3. The court of appeals denied petitioner's petition for review of the BIA's decision. Pet. App. 1a-16a. The court first rejected petitioner's argument that Section 1229b(d)(1)'s reference to "a notice to appear under § 1229(a)" unambiguously requires that a notice to appear containing all of the information listed in Section 1229(a)(1), including the specific date and time of the removal hearing, be served on the alien before it can trigger the stop-time rule. Pet. 7a-9a. The court observed that Section 1229b(d)(1) "does not explicitly state that the date and time of the hearing must be included in a notice to appear in order to cut off an alien's period of continuous presence." *Id.* at 9a. And it reasoned that the statute's reference to "'under' § 1229(a)" does not "clearly indicate" that the rule incorporates all of the requirements of paragraph (1) of Section 1229(a). *Ibid.*

The court of appeals disagreed with the Third Circuit's reasoning that "§ 1229(a)(1)'s commandment that a notice to appear specifying the ten pieces of information listed '*shall* be given in person to the alien'" provided the missing clarity. Pet. App. 7a-8a (quoting *Orozco-Velasquez* v. *Attorney Gen. U.S.*, 817 F.3d 78, 83 (2016)). "It is undisputed," the court observed, "that § 1229(a)(1) creates a duty requiring the government to provide an alien with the information listed in that provision." *Id.* at 8a. "But whether a notice to appear that

omits some of this information nonetheless triggers the stop-time rule [in Section 1229b(d)(1)] is a different question." *Ibid.*

Having found the provision ambiguous, the court of appeals concluded that the BIA's interpretation was "a permissible construction of the stop-time rule." Pet. App. 10a; see *id.* at 9a-15a; see *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). It agreed with the BIA's reasoning from *Camarillo* that, because Section 1229(a) is the "'primary reference in the [INA] to the notice to appear,'" Pet. App. 10a (quoting *Camarillo*, 25 I. & N. Dec. at 647) (brackets in original), it is logical to read the phrase "under section 1229(a)" in the stop-time rule as merely "specif[ying] the document the DHS must serve on the alien to trigger the 'stop-time' rule," *ibid.* (quoting *Camarillo*, 25 I. & N. Dec. at 647). And it found reasonable the BIA's reliance on the administrative context in which notices to appear are issued—namely, that while DHS serves the notice to appear, it is the immigration court that sets the date and time of an initial hearing, and that information is often unavailable to DHS when it serves the notice. *Id.* at 12a.

The court of appeals also agreed that the legislative history of the stop-time rule supported the BIA's reading. The rule was enacted, the court reasoned, to close a "legal loophole" that permitted an alien's continuous physical presence, for purposes of cancellation of removal, to be calculated without regard to "'whether or when the Immigration and Naturalization Service had initiated deportation proceedings against the person.'" Pet. App. 12a-13a (quoting *Camarillo*, 25 I. & N. Dec. at 650). Moreover, the court observed, the requirement that DHS send the notice to appear itself, informing aliens of, among other things, the requirement to "notify

the government of any changes in their contact information," was intended to "prevent notice problems from dragging out the deportation process." *Id.* at 13a-14a. In light of that history, the court of appeals concluded, it would "make little sense" for Congress to have "condition[ed] the activation of the stop-time rule on the receipt of a hearing notice that may come months, or even years, after the initiation of deportation proceedings." *Id.* at 14a.

Because the court of appeals deferred to the BIA's interpretation of the stop-time rule, it agreed with the BIA's conclusion that petitioner's period of continuous physical presence ended when he was served with a notice to appear in 2006, and that therefore he was ineligible for cancellation of removal. *Id.* at 15a-16a.

ARGUMENT

Petitioner contends (Pet. 15-35) that the court of appeals wrongly denied his petition for review of the BIA's determination that he was ineligible for cancellation of removal by virtue of his failure to meet the eligibility requirement of ten years of continuous physical presence. He urges this Court to grant the petition for a writ of certiorari to resolve a conflict about whether a notice to appear must include a date and time certain for an alien's initial removal hearing in order to be "deemed to end" the alien's continuous physical presence under 8 U.S.C. 1229b(d)(1). The court of appeals' decision denying his petition for review was correct, and this case is not an appropriate vehicle for resolving the conflict on which petitioner relies because even if the Court were to adopt petitioner's interpretation of the statute, he would still not likely be eligible for cancellation of removal. Further review is therefore unwarranted.

1. To be eligible for cancellation of removal, an alien who is not a lawful permanent resident must establish, among other things, that he has been "physically present in the United States for a continuous period of at least ten years." 8 U.S.C. 1229b(b)(1)(A). Under the stop-time rule, an applicant's period of continuous residence is "deemed to end * * * when the alien is served a notice to appear under section 1229(a)" of the INA. 8 U.S.C. 1229b(d)(1). Petitioner entered the United States in June 2000 and was personally served with a notice to appear issued pursuant to Section 1229(a) on May 31, 2006. See Pet. App. 3a; A.R. 217-218 ("Notice to Appear"). Under the plain terms of the INA, his "continuous physical presence" in the United States was therefore "deemed to end" on that date, well short of the ten years of continuous physical presence required for cancellation of removal. 8 U.S.C. 1229b(d)(1). The BIA thus correctly denied petitioner's application for cancellation of removal.

Petitioner contends (Pet. 20-26) that the statute "unambiguously" requires a different result, because the notice to appear that he received did not specify the date and time of his initial removal hearing. He argues (Pet. 20) that the text, structure, and legislative history of the stop-time rule all make clear that "the stop-time rule does not end the period of continuous residence until the immigrant has been served with *all* the information" listed in paragraph (1) of Section 1229(a), and because the date and time of the hearing are among the information listed in that paragraph, the stop-time rule does not apply until an alien receives that information. Petitioner is mistaken.

a. The text of the stop-time rule provides that "[f]or purposes of [Section 1229b], any period of continuous

residence or continuous physical presence in the United States shall be deemed to end * * * when the alien is served a notice to appear under section 1229(a) of this title." 8 U.S.C. 1229b(d)(1). Petitioner argues that the phrase "served a notice to appear under section 1229(a)" unambiguously means "served with written notice of the specific information listed in § 1229(a)(1)." Pet. 21-22. In essence, petitioner would read "under section 1229(a)" to mean "in compliance with section 1229(a)(1)" or "in accordance with section 1229(a)(1)," such that any notice to appear that does not include all the information required by that subsection does not qualify as a "notice to appear under section 1229(a)."

As this Court has repeatedly recognized, however, "[t]he word 'under' has many dictionary definitions and must draw its meaning from its context." *Ardestani* v. *United States*, 502 U.S. 129, 135 (1991); see *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 531 (2013) ("[T]he word evades a uniform, consistent meaning."); *Kucana* v. *Holder*, 558 U.S. 233, 245 (2010) ("The word 'under' is chameleon."); *Florida Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 40 (2008) ("[T]he variability of the term 'under' is well documented."). That recognition alone defeats petitioner's argument that the text "unambiguously" commands his reading.

In fact, petitioner's reading of the phrase is not even the most natural one. "[A] thing that is "'under'" a statute is most naturally read as being "'subject to'" or "'governed by'" the statute." *Florida Dep't of Revenue*, 554 U.S. at 39 (quoting *Ardestani*, 502 U.S. at 135); see also *id.* at 52-53 (noting that the "most natural reading" is "pursuant to"). There is no question that the notice to appear petitioner received in May 2006 was "subject to," "governed by," and "pursuant to" Section 1229(a).

Section 1229(a) "is the primary reference in the Act to the notice to appear." *In re Camarillo*, 25 I. & N. Dec. 644, 647 (B.I.A. 2011); see 8 U.S.C. 1229(a) (entitled "Notice to appear"). No other provision in the INA requires or authorizes DHS to serve such a notice to appear. It was no coincidence that, by all accounts, the notice satisfied all ten of the requirements of Section 1229(a)(1) other than specifying the time and date of the hearing. Compare 8 U.S.C. 1229(a)(1)(A)-(G), with A.R. 217-218.

At times, petitioner seems to suggest (Pet. 22) that a document that does not contain *all* of the information listed in Section 1229(a)(1) cannot rightly be called a "notice to appear." But, of course, it can. An incomplete "notice to appear" can still be a "notice to appear," just as an unsigned notice of appeal can still be a notice of appeal. Cf. *Becker* v. *Montgomery*, 532 U.S. 757, 768 (2001) (holding that an unsigned notice of appeal satisfied Federal Rule of Appellate Procedure 3(a)(1)'s requirement to timely "fil[e] a notice of appeal with the district clerk," as long as it was subsequently signed, even after the time to appeal has expired). Petitioner recognizes as much elsewhere when he refers (Pet. 33) to the type of notice that petitioner received as "an incomplete notice to appear," and when he asserts (Pet. 26) that the stop-time rule ends a period of continuous physical presence only upon the service of a "complete notice to appear."

Petitioner also relies (Pet. 23) on this Court's decision in *Ardestani* to argue that "notice to appear under section 1229(a)" cannot be read to include a notice that does not satisfy the requirements of Section 1229(a)(1). But that reliance is misplaced. In that case, the Court held that the Equal Access to Justice Act (EAJA),

5 U.S.C. 504; 28 U.S.C. 2412, did not authorize the award of attorney's fees in deportation proceedings. *Ardestani*, 502 U.S. at 131. EAJA provides for such awards in agency "adjudication[s] under section 554" of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* 5 U.S.C. 504(b)(1)(C)(i). The Court interpreted "under" in accordance with its most natural meaning: "subject or pursuant to" or "by reason of the authority of." *Ardestani*, 502 U.S. at 135 (brackets and citation omitted). Thus, although deportation proceedings were required by regulation to conform closely to the procedures dictated in Section 554 of the APA, the Court held that they were not "adjudications under section 554" because they were not "governed by the APA." *Id.* at 133.

Petitioner overreads (Pet. 23) the Court's decision when he claims that EAJA applies "only to a hearing meeting the specific requirements listed in" Section 554. No one would think, for example, that the authority to award attorney's fees under EAJA suddenly disappears if, during a proceeding held pursuant to 5 U.S.C. 554, an agency fails to give "all interested parties [an] opportunity" to be heard, 5 U.S.C. 554(c), or if it fails to give the parties proper notice of the "time, place, and nature of the hearing" or the "legal authority * * * under which the hearing is to be held," 5 U.S.C. 554(b). Regardless of whether the agency satisfies these requirements, any adjudication to which Section 554 applies is "subject to"—and therefore "under"—that provision. So too here.

b. Contrary to petitioner's contention (Pet. 26-27), the statutory structure confirms the BIA's interpretation of the stop-time rule. As the title of Section 1229 indicates, a primary purpose of the notice to appear is the "[i]nitiation of removal proceedings." 8 U.S.C. 1229;

see *Camarillo*, 25 I. & N. Dec. at 650. It reflects the government's formal determination to charge the alien with removability. A notice to appear can and does serve that purpose without providing a specific date and time for the alien's initial hearing, by providing the alien a host of information about those proceedings, including, among other things, the fact of their initiation, the legal authority for the proceedings, the charges about the alien, and his right to be represented by counsel. 8 U.S.C. 1229(a)(1); see *Camarillo*, 25 I. & N. Dec. at 650. Nothing in the stop-time rule indicates that the absence of a specific date and time makes the initiating document anything other than a "notice to appear under section 1229."

By contrast, another provision of the INA indicates that full compliance with Section 1229(a)(1) is required for other purposes. If, after the government provides the written notice required by paragraph (1) of Section 1229(a), an alien does not appear at the removal proceedings, he may be ordered removed "in absentia." 8 U.S.C. 1229a(b)(5)(A). Such an in-absentia order may be rescinded only in narrow circumstances. One of those circumstances, and the one on which petitioner relied here, is if the alien shows that he "did not receive notice *in accordance with paragraph (1) or (2) of section 1229(a)*." 8 U.S.C. 1229a(b)(5)(C)(ii) (emphasis added). Two aspects of this provision make clear that the stop-time rule does not apply only to notices issued in full compliance with Section 1229(a)(1).

i. First, unlike the stop-time rule, Section 1229a(b)(5)(C)(ii) refers specifically to paragraphs (1) and (2) of Section 1229(a), indicating that where Congress intended to hinge the application of a rule on the provisions of specific paragraphs of Section 1229(a), it knew

how and did so explicitly. By contrast, as the BIA noted, the stop-time rule's general reference to "section 1229(a)" tends to show that Congress was not concerned about the requirements imposed by any particular subsection.

Petitioner argues (Pet. 27) that the general reference to Section 1229(a) in the stop-time rule supports his reading because a notice to appear is defined only in paragraph (1) of Section 1229(a) and "no one has argued that notice of a change in the time or place of a hearing under § 1229(a)(2) has any impact on the stop-time rule." Presumably, petitioner also does not intend to argue that the Attorney General must have complied with paragraph (3) of Section 1229(a), requiring the creation of a system to record updated mailing addresses, for a notice to appear to trigger the stop-time rule.[1] But it is not clear how any of that helps petitioner. All it proves is that, even under petitioner's reading, "notice to appear under section 1229(a)" requires full compliance only with paragraph (1) of Section 1229(a). It does not explain why, if that were so, Congress would not have specifically referred to paragraph (1)—a failure that is all the more inexplicable in light of Congress's specific reference to paragraphs (1) and (2) in Section 1229a(b)(5)(C)(ii).

ii. Second, and perhaps more importantly, Section 1229a(b)(5)(C)(ii) clearly provides that, before ordering an alien removed in absentia, the government must have provided notice "*in accordance with* paragraph (1) or (2) of section 1229(a)." 8 U.S.C. 1229a(b)(5)(C)(ii) (emphasis added). Under that formulation, an alien

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[1] But see Pet. App. 11a n.6 (noting that, in the court of appeals, petitioner "neither addresse[d] whether the stop-time rule incorporates § 1229(a)(2) and (a)(3), nor argues that the rule somehow incorporates only the requirements of § 1229(a)(1)").

may not be ordered removed in absentia unless he has been served with all of the information listed the applicable paragraph of Section 1229(a). Congress's use of different—and much clearer—language in Section 1229a(b)(5)(C)(ii) to establish such a rule in the context of in-absentia orders provides strong evidence that "notice to appear under section 1229(a)" does not carry the same meaning in the context of the stop-time rule. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets in original; citation omitted).

c. Finally, the legislative history of the stop-time rule also strongly supports the BIA's interpretation. As the First Circuit recognized, the stop-time rule was enacted to close a "legal loophole," Pet. App. 13a (citation omitted), by which "some [f]ederal courts [would] permit aliens to continue to accrue time toward the [continuous physical presence] threshold even after they ha[d] been placed in deportation proceedings," H.R. Rep. No. 469, 104th Cong. 2d Sess. Pt. 1, at 122 (1996) (House Report). See Pet. App. 12a-13a. As petitioner recognizes (Pet. 28), that loophole was "often abused by aliens seeking to delay proceedings until [the requisite time] ha[d] accrued." House Report 122. Petitioner focuses on efforts to obstruct deportation proceedings by filing meritless continuances and similar procedural mechanisms. But the abuses to which the legislative history refers also expressly "include[d] aliens," like petitioner, "who failed to appear for their deportation proceedings and were ordered deported in absentia, and then seek

to re-open proceedings once the requisite time has passed." *Ibid.*

Congress closed that loophole by deeming an alien's continuous presence to end upon service of the document that initiates deportation proceedings. 8 U.S.C. 1229b(d)(1). See House Report 160 ("The time period for continuous physical presence terminates on the date a person is served a notice to appear for a removal proceeding."); 143 Cong. Rec. 25,543 (1997) ("IIRIRA changed th[e] rule to bar additional time for accruing after receipt of a 'notice to appear,' the new document the Act created to begin 'removal' proceedings."). There is no reason that Congress would have wanted an alien to be able to take advantage of the very loophole it sought to close, merely because the notice to appear that initiated his deportation proceedings did not include a precise date and time for his initial hearing.

d. For all these reasons, the best reading of the stop-time rule is that an alien's continuous physical presence is "deemed to end" upon service of a notice to appear served pursuant to Section 1229(a), even if that notice does not include a specific date and time for the alien's initial removal hearing. At a minimum, however, the statute is at least ambiguous as to the answer to that question, and the court of appeals correctly deferred to the BIA's reasonable interpretation. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

When "a statute leaves a 'gap' or is 'ambiguous,'" this Court "typically interpret[s] it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute." *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2142 (2016) (brackets omitted). Congress has delegated authority to interpret the INA to the Attorney General, and through him

to the BIA, see 8 U.S.C. 1103(a)(1) and (g), and thus this Court defers to the BIA's reasonable construction of ambiguities in the Act. See *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (opinion of Kagan, J.); *id.* at 2215-2216 (Roberts, C.J., concurring in the judgment); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999).

In *Camarillo*, the BIA thoroughly examined the question presented here and issued a precedential decision adopting the interpretation followed in the proceedings below. The BIA considered the text, statutory structure, and legislative history, as well as the administrative context in which notices to appear are issued—where it is often not practical for DHS to include a date and time certain when issuing notices to appear. And the BIA concluded that "the DHS's service of a notice to appear triggers the 'stop-time' rule, regardless of whether the date and time of the hearing have been included in the document." *Camarillo*, 25 I. & N. Dec. at 651. For the reasons described above, the BIA's construction of the statute was reasonable and thus entitled to deference.

2. Petitioner contends (Pet. 17-19) that the Court should issue a writ of certiorari to resolve a circuit split on whether a notice to appear that does not specify a date and time for the alien's initial hearing ends the alien's continuous physical presence for purposes of his eligibility for cancellation of removal. Of the seven courts of appeals to have addressed that question in precedential opinions, six have found the BIA's construction of the statute to be reasonable and entitled to deference. See Pet. App. 1a-16a; *Moscoso-Castellanos* v. *Lynch*, 803 F.3d 1079, 1083 (9th Cir. 2015); *Guaman-Yuqui* v. *Lynch*, 786 F.3d 235, 240 (2d Cir. 2015) (per curiam); *Gonzalez-Garcia* v. *Holder*, 770 F.3d 431, 434-435 (6th

Cir. 2014); *Wang* v. *Holder*, 759 F.3d 670, 675 (7th Cir. 2014); *Urbina* v. *Holder*, 745 F.3d 736, 740 (4th Cir. 2014); see also *O'Garro* v. *United States Att'y Gen.*, 605 Fed. Appx. 951, 953 (11th Cir. 2015) (per curiam). The Third Circuit alone has concluded that the Board's construction of the stop-time rule is impermissible. See *Orozco-Velasquez* v. *Attorney Gen. U.S.*, 817 F.3d 78, 81-82 (2016). Even if that disagreement may, at some point, warrant this Court's review, however, this case is not an appropriate vehicle for resolving the disagreement.

Even if petitioner met the continuous presence requirement, further review is not warranted because he would likely be ineligible for cancellation of removal on the basis of another statutory requirement. In addition to establishing ten years of continuous presence, cancellation applicants must also "establish[] that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1229b(b)(1)(D). To meet that standard, the alien must prove that the hardship to his U.S. citizen (or lawful permanent resident) relatives, if the alien were removed, would be "'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 62 (B.I.A. 2001) (quoting H.R. Conf. Rep. No. 828, 104th Cong. 2d Sess. 213 (1996) (Conf. Report)). It can be met in only "'truly exceptional' situations." *Ibid.* (quoting Conf. Report 213-214).

Petitioner notes (Pet. 4) that he is "the father of, and primary breadwinner for, two young, U.S.-citizen children." See Pet. 12-13. He contends that his removal

"would undoubtedly cause his [two U.S. citizen] daughters 'exceptional and unusual hardship.'" Pet. 34 (citation omitted). Without questioning whether petitioner's deportation would cause some hardship to his daughters, those facts do not remotely make his case "truly exceptional" or prove that his removal would cause hardship to his daughters "substantially beyond the ordinary hardship that would be expected when a close family member leaves this country." *Monreal-Aguinaga*, 23 I. & N. Dec. at 62; see, *e.g.*, *id.* at 62, 64 (concluding that the removal of a father of two U.S.-citizen children would not cause "exceptional and extremely unusual hardship" because "[t]here [wa]s nothing to show that he would be unable to work and support his United States citizen children in [his home country]"); *In re Andazola-Rivas*, 23 I. & N. Dec. 319, 324 (B.I.A. 2002) (concluding that the removal of a single mother of two children would not cause "exceptional and extremely unusual hardship"). Thus, even if the Court were to adopt petitioner's interpretation of the stop-time rule, his removal proceedings would be unlikely to reach a different conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
ROBERT N. MARKLE
Attorneys

DECEMBER 2017

No. 17-459

IN THE

Supreme Court of the United States

WESCLEY FONSECA PEREIRA,

Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

REPLY BRIEF FOR PETITIONER

DAVID J. ZIMMER
ALEXANDRA LU
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210

JEFFREY B. RUBIN
TODD C. POMERLEAU
RUBIN POMERLEAU PC
3 Center Plaza, Ste. 400
Boston, MA 02108

WILLIAM M. JAY
Counsel of Record
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinlaw.com
(202) 346-4000

Counsel for Petitioner

December 19, 2017

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REPLY BRIEF FOR PETITIONER

The government agrees that the sole question presented in this case, concerning the proper interpretation of the stop-time rule, is the subject of an entrenched circuit conflict. Opp. 18-19. And the government does not dispute that this conflict will persist unless this Court intervenes, or that the question presented is of "exceptional importance" and arises frequently, as explained by *amicus* American Immigration Lawyers Association ("AILA"). AILA Br. 2, 7-8. Until this Court resolves the conflict, the accident of geography will bar some deserving immigrants, but not others, from even *applying* for one of the most important forms of relief available under immigration law.

Despite the certworthy conflict, the government opposes certiorari, arguing that it will likely win on the merits and that even if it does not, Mr. Pereira will likely lose on other grounds. Neither prediction is well founded, and neither is a valid reason to leave the circuit split unresolved. The government's speculation about what would happen *if* Mr. Pereira were allowed to seek cancellation of removal falls particularly flat. Once the immigration judge ("IJ") found Mr. Pereira ineligible for cancellation, he denied Mr. Pereira the opportunity even to *submit a cancellation application*. Neither the court below nor any immigration court has ever looked at the merits of Mr. Pereira's claim for cancellation. The question presented asks only whether Mr. Pereira is *eligible* to seek such a merits determination. This Court should proceed to answer that question, rather than assume from an undeveloped record that eligibility for relief

would do Mr. Pereira no good. That is the course the government itself has repeatedly taken in supporting certiorari review of questions that bear on eligibility to seek relief.

The government devotes the vast majority of its opposition to arguing that the Board of Immigration Appeals ("BIA") correctly resolved the merits. Opp. 9-18. But even if that were right—and it is not—it would not be a reason to deny certiorari and leave in place an entrenched circuit conflict. Further, as explained in the petition (at 21-31) and below (at 8-12, *infra*), and as the Third Circuit held in *Orozco-Velasquez v. Attorney General*, 817 F.3d 78 (3d Cir. 2016), the BIA's interpretation directly conflicts with the statute's unambiguous text.

The Court should resolve the conflict.

I. The Court Should Grant Certiorari To Resolve The Acknowledged Circuit Conflict On An Important And Frequently Recurring Issue.

A. The Government Concedes That The Question Presented Is Certworthy.

1. As the petition explained (at 17-18), and the government concedes (at 18-19), there is a clear circuit conflict concerning the question presented. Two courts of appeals originally held that service of a document that does not include the information required by the definition of a "notice to appear" in 8 U.S.C. § 1229(a) does *not* trigger the stop-time rule.[1]

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[1] *Guamanrrigra v. Holder*, 670 F.3d 404, 410-11 (2d Cir. 2012); *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 937 n.3 (9th Cir. 2005).

The BIA disagreed, concluding that service of such a document *does* trigger the stop-time rule.[2] Five courts of appeals have now deferred to the BIA's decision, including the two courts that had originally reached the opposite conclusion.[3] The Third Circuit considered, and disagreed with, these courts, holding that the BIA's interpretation conflicts with the statute's unambiguous text.[4] And now the First Circuit has explicitly disagreed with the Third Circuit. Pet. App. 7a-9a.

The government does not dispute that the conflict will persist until this Court intervenes. *See* Pet. 18. In particular, the government rightly does not argue that the Third Circuit might change its mind, because further percolation in that circuit is impossible. Within the Third Circuit, immigrants situated identically to Mr. Pereira currently have their cancellation applications adjudicated on the merits, because the immigration courts in that part of the country follow the Third Circuit's decision in *Orozco-Velasquez*. And the immigration courts' decisions in such merits adjudications will not be reviewable by the Third Circuit: the government cannot petition for review of a BIA decision to grant relief, and a respondent cannot seek review of the BIA's discretionary decision to deny cancellation. *See* 8 U.S.C. § 1252(a)(2)(B). Without this Court's intervention,

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[2] *Matter of Camarillo*, 25 I. & N. Dec. 644 (BIA 2011).

[3] *Moscoso-Castellanos v. Lynch*, 803 F.3d 1079, 1082-83 (9th Cir. 2015); *Guaman-Yuqui v. Lynch*, 786 F.3d 235, 238-40 (2d Cir. 2015); *Gonzalez-Garcia v. Holder*, 770 F.3d 431, 434-35 (6th Cir. 2014); *Wang v. Holder*, 759 F.3d 670, 674 (7th Cir. 2014); *Urbina v. Holder*, 745 F.3d 736, 740 (4th Cir. 2014).

[4] *Orozco-Velasquez*, 817 F.3d at 82-86.

the circuit conflict, and the obvious inequities it creates, *see* Pet. 17-18, will continue.[5]

2. The government also does not contest that the circuit conflict at issue in this case is of "exceptional importance" and recurs frequently. *See* Pet. 19; AILA Br. 7-13. The effect of the decision below, and those like it, is to deny cancellation of removal even to immigrants who would otherwise qualify for that relief based on "exceptional and extremely unusual hardship" to an immediate relative. And because there is a separate stop-time rule for commission of many crimes, 8 U.S.C. § 1229b(d)(1)(B), the immigrants affected by *this* stop-time rule are likely to be those who, like Mr. Pereira, have no criminal history of any significance. Pet. 19. As AILA explains (at 9-13), for those immigrants and their families the question presented is "deeply important and life-altering." Cancellation eligibility means permanent residence in the United States, while ineligibility means deportation and separation from U.S.-citizen and lawful-permanent-resident family members, an extreme measure that this Court has analogized to criminal punishment. *See* AILA Br. 10-11.

Furthermore, the interpretive question presented here has repeatedly been outcome-determinative: it has generated seven published appellate decisions in the last three years alone, in addition to many unpublished decisions. Pet. 19; AILA Br. 7-8. In AILA's experience it is "common practice" for the gov-

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[5] The government thus does not argue that the Court should wait until another circuit joins the Third and compounds the inequity. This Court regularly validates the position of one circuit in a split, especially in the immigration context. *See, e.g.*, *Judulang v. Holder*, 565 U.S. 42, 52 n.6 (2011).

ernment to serve "notice lacking the statutorily required date and time," and "it can be years from the time a noncitizen receives a deficient notice until he actually receives a hearing date." AILA Br. 7. Frequently, therefore, the government fails to meet the statutory definition and trigger the stop-time rule until after the immigrant satisfies the relevant residence requirement. AILA Br. 7-8.

B. The Courts Below Decided Only The Eligibility Question That Has Split The Circuits, Preventing Mr. Pereira From Building A Record On Whether He Will Win Relief If Eligible.

The government's only argument about the certworthiness of this case (as opposed to the merits) is that Mr. Pereira "likely" cannot show that his removal would cause sufficient hardship to his four- and nine-year-old U.S.-citizen daughters. Opp. 19-20. But the mere possibility that the government might win a particular case on alternative grounds after losing in this Court is not a persuasive reason to deny review of a pressing, certworthy legal issue that is properly presented. And it is especially unpersuasive here, as the government's "alternative" ground is actually linked to the resolution of the question presented. Because of the circuit in which Mr. Pereira's case originated, he was deemed ineligible to seek cancellation and *barred* from adducing the evidence that could show he deserves to receive it. Having deprived him of any opportunity to bat, the government cannot now complain that the record does not show whether he would have gotten on base.

1. The government's vehicle objection is particularly meritless given that the IJ did not even allow Mr. Pereira to *submit* an application for relief. *See* Pet. App. 23a (IJ refusing to allow Mr. Pereira "to submit an application for cancellation of removal"). Rather than speculate concerning how the IJ would evaluate a future cancellation application, this Court should grant certiorari to resolve the circuit conflict concerning whether Mr. Pereira is eligible to apply for cancellation *at all*.

2. This Court frequently grants certiorari in cases concerning *eligibility* for relief even where it is not clear the immigrant would ultimately merit relief. For instance, in *Holder v. Gutierrez*, 566 U.S. 583 (2012), the Ninth Circuit held that the immigrants satisfied the same period-of-residence requirement at issue in this case and remanded for the BIA to adjudicate the cancellation applications on the merits. *Id.* at 590. The *government* successfully sought certiorari even though the IJ might well have denied cancellation on remand. Far from viewing that possibility as a vehicle problem, the government's reply brief in support of certiorari identified multiple other cases in which this Court had granted certiorari "petitions by aliens from decisions restricting eligibility for discretionary relief" before entitlement to relief had been adjudicated. Gov't Cert. Reply Br. at 11, *Gutierrez, supra* (Nos. 10-1542 and 10-1543) (citing *Judulang v. Holder*, 565 U.S. 42 (2011), and *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 571 (2010)).

The government was right about *Judulang* and *Carachuri-Rosendo*: the grants of certiorari in those cases further undermine the government's vehicle argument. In *Judulang*, this Court granted certiora-

ri to resolve a lopsided split concerning eligibility for relief under the predecessor to the cancellation-of-removal statute, even though the government's opposition to certiorari suggested the petitioner might not merit relief as a matter of discretion. *See* Gov't Br. in Opp. at 16 n.8 (No. 10-694). In *Carachuri-Rosendo*, the government did not even make that argument. The question was whether a particular criminal conviction rendered an immigrant ineligible for cancellation of removal. 560 U.S. at 571. Without suggesting that the petitioner had a particular likelihood of obtaining cancellation if found eligible, the government acquiesced in certiorari, describing the case as "an appropriate vehicle" to resolve the eligibility question. Br. for the Respondent at 16 (No. 09-60). In those cases, a stark split on eligibility for relief could not be brushed aside on the theory that *nobody* would qualify for relief anyway. So too here.

3. Even the current, undeveloped record suggests that Mr. Pereira will make a strong case that his removal will create sufficient hardship for his U.S.-citizen daughters. Though the standard for cancellation is high, it does not require that the harm be "unconscionable," nor is it "so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief." *Matter of Recinas*, 23 I. & N. Dec. 467, 468, 471 (BIA 2002). Instead, the applicant must show, based on balancing numerous factors, that a qualifying relative would "suffer hardship that is substantially beyond that which would ordinarily be expected to result from the person's departure." *Id.* at 468.

The record already shows that Mr. Pereira is not just a loving and involved father, but also the breadwinner for his four- and nine-year-old children, who were born in the United States and have lived their whole lives here. Even these facts are analogous to those on which the BIA has relied in finding sufficient hardship. *Recinas*, 23 I. & N. Dec. at 470-73 (noting, among other things, that the applicant's children "kn[e]w no other way of life" than living in the United States and were "entirely dependent" on the applicant for support). Mr. Pereira could submit significantly more evidence concerning hardship to his daughters if he were allowed to apply for cancellation.

The government's professed doubt that Mr. Pereira could show sufficient hardship to his U.S.-citizen daughters thus creates no vehicle problem. The Court should resolve the circuit conflict concerning whether Mr. Pereira can even *try* to make that showing.

II. The Government's Merits Arguments Provide No Reason To Deny Certiorari And Cannot Overcome The Clear Statutory Text.

The government spends most of its opposition arguing why the BIA was right. Opp. 10-18. Whatever the merits of these arguments, they provide no reason for this Court to leave in place an entrenched circuit conflict. And the government's arguments are wrong in any event—the government cannot overcome the clear statutory text, which triggers the stop-time rule only upon service of a "notice to appear *under § 1229(a)*," a provision that defines a "no-

tice to appear" as a document with specific *substance*, not just a specific title. 8 U.S.C. § 1229d(1) (emphasis added).

1. The government's primary argument is that the statute must be ambiguous because the word "under" has "many dictionary definitions." Opp. 11 (quoting *Ardestani v. United States*, 502 U.S. 129, 135 (1991)). But that does not mean that every statute using "under" *must be* ambiguous. *E.g.*, *Mead Corp. v. Tilley*, 490 U.S. 714, 722-23 (1989) (phrase "benefits under the plan" "can refer only to" one particular allocation of benefits). Rather, the word "draw[s] its meaning from context," Opp. 11 (quoting *Ardestani*, 502 U.S. at 135), and in *this* context, the word "under" creates no ambiguity.

The cases on which the government relies all involve questions concerning when conduct is carried out "under" a particular statutory provision. *E.g.*, *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 531 (2013) (interpreting a copyright provision governing copies "lawfully made under this title"); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 40 (2008) (interpreting a bankruptcy provision governing the "making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title"). Here, by contrast, the statute triggers the stop-time rule only on service of a "notice to appear under" a provision that not just regulates the government's conduct, but *specifically defines the term "notice to appear."* A document that flunks the notice-to-appear definition in § 1229(a) simply cannot be a "notice to appear under § 1229(a)." Of course, the government can "call[]" anything—even an otherwise-blank piece of paper—a

"notice to appear," Opp. 12, but that does not make it a "notice to appear *under § 1229(a)*" when § 1229(a) gives the term a specific, substantive meaning.

The government seems to acknowledge that a notice must meet at least *some* of the substantive requirements from § 1229(a)'s definition to qualify as a "notice to appear under § 1229(a)." *Compare* Opp. 14 *with* 8 U.S.C. § 1229(a)(1)(A)-(E). But the government can only distinguish among the elements of the definition with a baldly atextual appeal to statutory "purpose," whereby some elements matter and some do not. Opp. 13, 14. On that basis, the government argues (at 14) that "[n]othing in the stop-time rule indicates that the absence of a specific date and time makes the initiating document" flunk the statutory definition. That is, nothing *except the plain statutory text*. If paragraphs (A)-(E) are mandatory, paragraphs (F) and (G) are too, and for the same textual reasons. The only plausible reading of the statute is that a "notice to appear" must contain *all* of the information listed in § 1229(a)'s definition.

2. The government's statutory-structure arguments are similarly unpersuasive. It is irrelevant that § 1229(d)(1) cross-references the subsection (§ 1229(a)), rather than the paragraph (§ 1229(a)(1)), that includes the notice-to-appear definition. *See* Opp. 14-15. Congress often uses cross-references that are not as specific as they could be. *E.g.*, 18 U.S.C. § 2119(2) (cross-referencing definition in "section 1365" when definition is in § 1365(h)(3)); 42 U.S.C. § 7661(2) (cross-referencing definition in "section 7412" when definition is in § 7412(a)(1)).

The *in absentia* provision on which the government relies (at 14-16) is not analogous to the stop-time

rule. The former provision needed to identify paragraphs (1) and (2) specifically in order to reference *both* types of notice: not just a "notice to appear," but also any notice of a change in hearing time or place under paragraph (2). The *in absentia* provision also required a phrase like "in accordance with," rather than a phrase like "under," because there is no defined term for the notice described in paragraph (2). *See* Opp. 15-16.

3. The government over-reads the legislative history. Opp. 16-17. Its citations show only that Congress did not want immigrants to be able to extend their qualifying residence period by deliberately failing to appear at their removal proceedings. But an immigrant cannot fail to show up at a hearing *until one is scheduled* and notice of the date and time is sent. So long as the government properly serves notice of the time of the initial hearing, along with the other information identified in the notice-to-appear definition, the residence period ends under § 1229(d)(1) without regard to whether the immigrant actually appears. It is only when the hearing notice is not properly "served"—as here, where the immigration court *undisputedly* sent the first hearing notice to the wrong address, through no fault of Mr. Pereira's, Pet. 13; Opp. 5-6; A.R. 133-34—that the residence period can continue through an *in absentia* removal proceeding.[6] Notably, the government does not even try to argue that the misdirected hearing notice stopped the clock; instead, it argues that the time stopped more than a year earlier, when

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[6] Even under those circumstances, the clock may already have stopped if the immigrant has committed a qualifying crime. 8 U.S.C. § 1229b(d)(1)(B).

Mr. Pereira was told he would have to appear "on a date to be set at a time to be set." A.R. 217. Nothing in the legislative history suggests that Congress wanted to end the period of continuous residence for immigrants before the government even set a hearing that could be ducked or delayed.

4. Given that the statutory text is unambiguous, the government's reliance on agency deference (at 17-18) is unavailing. *See* Pet. 31. Even if the statute were somehow ambiguous, the agency's interpretation would still fail. It is not the better reading of the statute—it had failed to convince a single court of appeals before the BIA's decision—and this Court should not adopt it just because an executive agency has. Pet. 22 n.4.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVID J. ZIMMER
ALEXANDRA LU
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210

JEFFREY B. RUBIN
TODD C. POMERLEAU
RUBIN POMERLEAU PC
3 Center Plaza, Ste. 400
Boston, MA 02108

WILLIAM M. JAY
Counsel of Record
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinlaw.com
(202) 346-4000

Counsel for Petitioner

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
OCT 30 2017
OFFICE OF THE CLERK

No. 17-459

IN THE

Supreme Court of the United States

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JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR *AMICUS CURIAE* THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

MARK BARR
LICHTER IMMIGRATION
1601 Vine Street
Denver, CO 80206
(303) 554-8400

Counsel for the American Immigration Lawyers Association

BRADLEY N. GARCIA
(*Counsel of Record*)
bgarcia@omm.com
JEREMY MALTBY
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Amicus Curiae

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Immigration Lawyers Association ("AILA") is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; to facilitate the administration of justice; and to elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security ("DHS"), immigration courts, and the Board of Immigration Appeals ("BIA"), as well as before the United States District Courts, Courts of Appeals, and the Supreme Court of the United States.

AILA has a deep understanding of the significant consequences the stop-time rule of the Immigration Nationality Act (the "INA") has for individuals placed in removal proceedings, and respectfully submits this brief as *amicus curiae* to alert the Court to the extreme practical importance of the question presented and the severe inequity created by the well-established circuit conflict over this issue.

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), timely notice was provided to counsel of record for all parties, and this brief is accompanied by the written consent of all parties.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The "stop-time" rule the First Circuit interpreted below determines whether many noncitizens facing deportation after years of residence in the United States are eligible for a discretionary form of relief called "cancellation of removal." As the petition details, there is a firmly-established conflict in authority over the proper application of that rule, and the issue recurs frequently.

Amicus submits this brief to demonstrate the exceptional importance of correctly determining eligibility to apply for cancellation of removal. The stakes of that determination are extreme: Noncitizens who receive cancellation are given status as lawful permanent residents and put on the path to citizenship; those denied it are removed from the country, torn from their families, communities, and livelihoods, and many are not permitted to even apply to return to the country for several years.

Further, cancellation of removal is the only form of relief from removal available to many noncitizens, and it is open only to the most deserving of applicants who can meet a demanding eligibility threshold. To be eligible for cancellation of removal, a noncitizen who is not a lawful permanent resident must show that he is a person of "good moral character"; that he has not been convicted of any of a broad range of criminal offenses; that he has an immediate family member who is a U.S. citizen or lawful permanent resident that would suffer "exceptional and extremely unusual hardship" if he were deported; and, finally, that he has maintained a ten-year peri-

od of continuous residence in the United States. 8 U.S.C. § 1229b(b)(1).[2]

Cancellation of removal is therefore the last, best hope for the most deserving noncitizens seeking to remain in the country with their family members. Indeed, cancellation of removal is the only way those family members—who are U.S. citizens or lawful permanent residents—can be saved from extreme hardship. Properly and consistently determining eligibility for that relief is therefore exceptionally important not just to the individuals who have lived in this country for years as productive members of our nation and our communities, but to their families as well.

That eligibility for such vital relief currently depends on an arbitrary matter of geography is intolerable. Review is all the more necessary because the First Circuit's reading of the statute is profoundly erroneous. Amicus therefore respectfully urges the Court to grant the petition to resolve the well-established circuit conflict over the question presented.

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[2] Slightly less onerous requirements apply to lawful permanent residents seeking cancellation of removal. *See* 8 U.S.C. § 1229b.

ARGUMENT

I. THE COURT SHOULD ACT TO ADDRESS A WELL-ESTABLISHED CIRCUIT SPLIT THAT WILL AFFECT THOUSANDS OF IMMIGRANTS

A. The Decision Below Reinforces A Well-Established Circuit Split Regarding The Stop-Time Rule

The First Circuit's decision cements a well-established circuit split concerning a matter of great importance: How the government measures the required period of continuous residence a noncitizen must prove to be eligible for cancellation of removal.

As noted above, one eligibility requirement for cancellation of removal is that a noncitizen must have "been physically present in the United States for a continuous period of not less than 10 years immediately preceding the" cancellation application. 8 U.S.C. § 1229b(b)(1)(A). Under the stop-time rule, the period of continuous residence ends upon service of a specific document: a "notice to appear under section 1229(a)." *Id.* § 1229b(d)(1). Section 1229(a), in turn, defines a "notice to appear" as "written notice . . . specifying" certain information, including the "time and place at which the proceedings will be held." *Id.* § 1229(a)(1). Thus, Congress provided that once a noncitizen has a notice to appear that describes the proceedings against him and sets a date and time for such proceedings, his period of continuous residence is stopped.

The First Circuit below held that the government can trigger the stop-time rule by serving a document *labeled* "notice to appear," even if that docu-

ment lacks the statutorily required components of a "notice to appear under section 1229(a)." *See* Pet. App. 2a. The First Circuit joined five other circuits in deferring to an interpretation of § 1229b(d)(1) by the Board of Immigration Appeals. *See Matter of Camarillo*, 25 I. & N. Dec. 644 (BIA 2011); *Moscoso-Castellanos v. Lynch*, 803 F.3d 1079 (9th Cir. 2015); *Guaman-Yuqui v. Lynch*, 786 F.3d 235 (2d Cir. 2015); *Gonzalez-Garcia v. Holder*, 770 F.3d 431 (6th Cir. 2014); *Wang v. Holder*, 759 F.3d 670 (7th Cir. 2014); *Urbina v. Holder*, 745 F.3d 736 (4th Cir. 2014). This deference appears outcome determinative: Prior to *Camarillo*, two courts of appeals correctly determined that the stop-time rule would apply only once a noncitizen received a notice to appear that includes the statutorily mandated information, *see Guamanrrigra v. Holder*, 670 F.3d 404, 410-11 (2d Cir. 2012); *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 937 n.3 (9th Cir. 2005), and only reversed course once the BIA adopted the opposite interpretation.

In direct and explicit conflict with those decisions, the Third Circuit has held that, under the plain text of the INA, the stop-time rule is only triggered by a notice to appear that is "in conformance with 8 U.S.C. § 1229(a)"—that is, one that notes the time and place at which the removal proceedings will take place, along with the other statutorily mandated information that is required for a document to be a "notice to appear under section 1229(a)." *Orozco-Velasquez v. Lynch*, 817 F.3d 78, 82 (3d Cir. 2016). The Third Circuit rejected the BIA's conclusion to the contrary because it "conflicts with the

INA's plain text, [and therefore] it is not entitled to *Chevron* deference." *Id.* at 81–82.

In the case below, the First Circuit considered and explicitly disagreed with the Third Circuit's reasoning. *See* Pet. App. 7a–8a. The split in authority is thus openly acknowledged and firmly entrenched.

This Court should not allow the meaning of a federal statute of this importance to turn on something as arbitrary as geography. The present case is illustrative: Wescley Fonseca Pereira remained in the country after his tourist visa expired in 2000, eventually settling in Martha's Vineyard, where he has lived for over a decade with his wife and U.S.-citizen children and is a respected member of the community. *See* Pet. 4. Less than six years after his visa expired, he was served with a notice lacking the statutorily mandated date and time. It was not until 2013, when he had been in the United States for over ten years, that Pereira was detained and placed in removal proceedings after being pulled over for failing to use his headlights.[3] *See* Pet. 13. When he then applied for cancellation of removal—at this point having been in the United States continuously for thirteen years since his visa expired—his application was denied based on the contention that the deficient 2006 notice to appear stopped the clock on his period of continuous residence. *Id.* at 13–14.

Now imagine Pereira had decided to settle with his family not in Martha's Vineyard, but in

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[3] DHS had mailed a notice to appear with date and time in 2007 to the incorrect address. As a result, Pereira did not receive any notice of proceedings against him after the deficient notice in 2006.

Stone Harbor, New Jersey, a different east coast beach community. There, under the Third Circuit's decision in *Orozco-Velasquez*, the continuous residence clock would *not* have been stopped by the deficient 2006 notice, and Pereira would have been eligible for cancellation of removal. 817 F.3d 78 at 71-82. Leaving the fate of thousands of noncitizens and their families up to an arbitrary matter of geography is intolerable, and this Court should intervene.

B. The Question Presented Recurs Frequently

Amicus's experience representing thousands of noncitizen clients reveals that the government's use of notice lacking the statutorily required date and time is common practice. In fact, as the BIA itself has noted, "DHS frequently serves" purported notices to appear without specifying the date and time of any removal hearing. *Matter of Camarillo*, 25 I. & N. Dec. at 648 (quoting *Dababneh v. Gonzales*, 471 F.3d 806, 809 (7th Cir. 2006)).

As this case well demonstrates, it can be years from the time a noncitizen receives a deficient notice until he actually receives a hearing date. Unlike in the criminal context, where the Speedy Trial Act ensures prompt prosecution of charges, *see* 18 U.S.C. §§ 3161-3174, and unlike in litigation governed by the Federal Rules of Civil Procedure, immigration law provides no assurance that the government will carry removal proceedings forward expeditiously. The majority interpretation of the stop-time rule compounds that problem by removing an incentive to even calendar an initial hearing within a reasonable amount of time.

A survey of recent judicial decisions confirms that this issue arises frequently: As the petition for certiorari notes, "All seven of [the published decisions in the courts of appeals concerning this issue] have come in the last three years alone." Pet. Br. at 3. Several unpublished or lower court decisions have addressed the impact of deficient notices to appear as well. *See Castillo v. Sessions*, 693 F. App'x 647, 648 (9th Cir. July 13, 2017); *Hernandez-Rubio v. U.S. Atty. Gen.*, 615 F. App'x 933, 934 (11th Cir. Sept. 16, 2015); *O'Garro v. U.S. Atty. Gen.*, 605 F. App'x 951, 953 (11th Cir. May 22, 2015); *Ordaz-Gonzalez v. Holder*, 533 F. App'x 752, 754 (9th Cir. July 17, 2013); *Zarbaelov v. Holder*, 499 F. App'x 96, 98 (2d Cir. Oct. 9, 2012).

II. ACCURATELY DETERMINING ELIGIBILITY FOR CANCELLATION OF REMOVAL IS EXCEPTIONALLY IMPORTANT

"Deportation relief, like deportation itself, has deep roots." Allison Brownell Tirres, *Mercy in Immigration Law*, 2013 BYU L. REV. 1563, 1583 (2013). For more than a century, discretionary relief from removal has been an essential part of our immigration system, allowing the government to ensure deserving individuals are not removed. *See, e.g.*, Immigration Act of 1917, § 3, proviso 7, ch. 29, 39 Stat. 874, 878 ("[A]liens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe...."); *I.N.S. v. St. Cyr*, 533 U.S. 289, 294 (2001) (noting that this provision also provides relief in deportation proceedings), Immigration and Nationality Act of 1952, 8 U.S.C.

§ 1182(c) (granting the Attorney General broad discretion to admit excludable noncitizens); *Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976) (applying that provision to deportation proceedings as well).

Fairly determining eligibility for the particular form of relief at issue here—cancellation of removal—has deep practical importance, since qualifying for cancellation of removal can mean the difference between deportation and a path to citizenship for the noncitizen, and the difference between stability or exceptional hardship for their U.S. citizen or lawful permanent resident family members. This vital form of relief already is open only to the most deserving applicants, particularly as the eligibility standards for cancellation of removal have become more stringent. The difficulty of meeting those criteria means that reversing the First Circuit's misinterpretation of the stop-time rule would not result in a windfall to noncitizens.

A. Eligibility For Cancellation Of Removal Is Deeply Important And Life-Altering For Noncitizens And Their Families

1. *Eligibility for cancellation can mean the difference between lawful permanent residence status and deportation*

The benefits of cancellation of removal are immense. Beyond the obvious fact that the individual will not be deported, receiving cancellation of removal can eventually lead to citizenship. If the noncitizen is eligible to apply and is granted cancellation of removal, the noncitizen will receive lawful permanent residence (commonly known as a "green card") and can apply for U.S. citizenship after at

least five years. 8 U.S.C. § 1427. The threshold for eligibility is high, but a significant number of noncitizens actually obtain cancellation of removal each year. Although the INA (8 U.S.C. § 1229b(e)(1)) allows only 4,000 cancellations of removal per year, immigration courts granted cancellation of removal in 3,358 cases in fiscal year 2016, 3,510 cases in fiscal year 2015, and 3,474 cases in fiscal year 2014. *See* EXECUTIVE OFFICE OF IMMIGRATION REVIEW, FY 2016 STATISTICS YEARBOOK at N1 (Mar. 2016). For over three thousand immigrants each year, then, a cancellation determination allows them to remain in the United States and avoid uprooting their lives.

The consequence of deeming an individual who would otherwise receive cancellation ineligible on the basis of the stop-time rule is, of course, dire. Deportation is a harsh consequence that should be limited to only those noncitizens Congress clearly intended to be subject to removal—indeed, in the context of cancellation of removal, deportation is a consequence that by definition imposes extraordinary harms on not just noncitizens petitioning for relief, but also their U.S. citizen or lawful permanent resident relatives. Because "deportation is a drastic measure and at times the equivalent of banishment or exile," the Court has noted that it "will not assume that Congress meant to trench on [a noncitizen's] freedom beyond that which is required by the narrowest of several possible meanings of [statutory language]." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *see also Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) ("We have long recognized that deportation is a particularly severe 'penalty'" (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893));

Jordan v. De George, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) (removal means "a life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens"); *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment or exile."); *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) ("[A]lthough deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling"); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (noting that deportation "may result also in loss of both property and life, or of all that makes life worth living").

The effects of deportation in this circumstance are long-lasting: For most unsuccessful applicants for cancellation of removal, the path back to the United States is strewn with obstacles, some requiring many years outside the United States before they can be reunited with their family members. *See, e.g.*, 8 U.S.C. § 1182(a)(9)(A)(ii)(I)-(II) (barring any noncitizen who "has been ordered removed" from being admitted to the United States "within 10 years of the date of such alien's departure or removal"); 8 U.S.C. § 1182(a)(9)(C)(i)(II) (permanently barring any noncitizen "who enters or attempts to reenter the United States without being admitted" after being ordered removed). And deportation leads to dire consequences for the noncitizen's U.S. citizen or lawful permanent resident family members, who are forced to choose between two bad options: staying behind without their family member, who is possibly the breadwinner or primary caregiver, or accompa-

nying their family member to a foreign country where they may have no family or community ties. *See, e.g.*, Luis H. Zayas & Laurie Cook Heffron, *Disrupting young lives: How detention and deportation affect US-born children of immigrants*, AM. PSYCH. ASSOC. (Nov. 2016); Lisseth Rojas-Flores et al., *Trauma and Psychological Distress in Latino Citizen Children Following Parental Detention and Deportation*, 9 PSYCH. TRAUMA: THEORY, RESEARCH, PRACTICE, & POLICY, 352, 352-61 (2017); Luis H. Zayas et al., *The Distress of Citizen Children with Detained and Deported Parents*, 24 J. OF CHILD & FAMILY STUDIES, 3213, 3213-23 (Nov. 2015); Kalina M. Brabeck et al., *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 AM. J. OF ORTHOPSYCHIATRY, 496-505 (2014).

2. *Cancellation of removal often provides the only relief available for noncitizens in removal proceedings*

Today, cancellation of removal is often the only form of relief available to those in removal proceedings; there are very few additional ways that otherwise-removable noncitizens can remain in the country. Of those few avenues available, most of these forms of relief are available in particularized situations that exclude many noncitizens from eligibility.

For example, so-called T and U visas are a narrow form of relief available specifically for noncitizens who are victims of human trafficking or criminal activities, respectively. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1477-80 (2000). Making out a

claim for asylum also requires specific circumstances that preclude many noncitizens from eligibility: Asylum claims must be made within one year of entry, 8 U.S.C. § 1158(a)(2)(B), and applicants must demonstrate they have a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" if forced to return. *Id.* § 1101(a)(42). Notably, neither T and U visas nor asylum helps to protect people on account of deep family connections in the United States, the motivating rationale behind cancellation of removal.

As a result of these limits, cancellation of removal is the only form of relief available to many immigrants who seek to remain in the United States.

B. The Threshold For Eligibility For Cancellation Of Removal Is High, Ensuring That Only The Most Deserving Noncitizens Are Eligible

The threshold for eligibility for cancellation of removal was heightened considerably by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996). IIRIRA "narrowed the forms of relief . . . that may be applied for as a defense to removal in immigration court." Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. REV. 923, 933 (2006); *see also St. Cyr*, 533 U.S. at 297 (describing how IIRIRA restricted the availability of discretionary relief to noncitizens in removal proceedings).

IIRIRA repealed a prior form of relief called "suspension of deportation" and replaced it with cancellation of removal, imposing an increased continuous residence requirement and increased hardship standard in the process. Suspension of deportation had a seven-year continuous presence requirement and a standard of "extreme hardship" that could include hardship to the noncitizen himself. *See* IIRIRA § 304(a)(3), 8 U.S.C. § 1229b(a)-(b); *see also In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 64-65 (BIA 2001); *In re Nolasco-Tofino*, 22 I. & N. Dec. 632, 641 (BIA 1999). Cancellation of removal requires ten years of continuous residence, and the new hardship standard requires a showing of "exceptional and extremely unusual hardship," not to the noncitizen himself, but to an immediate family member (not including a sibling) who must be a United States citizen or lawful permanent resident. 8 U.S.C. § 1229b(b)(1)(D).

As noted above, IIRIRA also limited the number of noncitizens who could be granted this newly restricted form of relief, providing that the government "may not cancel the removal . . . of a total of more than 4,000 aliens in any fiscal year." 8 U.S.C. § 1229b(e)(1). IIRIRA also narrowed judicial review of immigration decisions, repealing provisions that had allowed noncitizens in custody to seek review of a deportation order in district court: Now, "a court cannot review the denial of most types of relief from removal that are granted at the discretion of the immigration officer or immigration judge, including . . . cancellation of removal." MARGARET MIKYUNG LEE, CONGRESSIONAL RESEARCH SERVICE, AN OVERVIEW OF JUDICIAL REVIEW OF IMMIGRATION MATTERS

at 3 (Sept. 11, 2013), htts://fas.org/sgp/crs/homesec/R43226.pdf; *see* 8 U.S.C. § 1252(a)(2).

All told, to be eligible for cancellation of removal, a noncitizen who is not a lawful permanent resident must have been physically present in the United States for a continuous period of not less than 10 years; must have been a person of "good moral character" during such period; must not have been convicted of certain criminal offenses, including an aggravated felony; and also must establish "exceptional and extremely unusual hardship" to a family member who is a U.S. citizen or lawful permanent resident. 8 U.S.C. § 1229b(b)(1).

Experience has demonstrated just how strenuous these statutory requirements are to satisfy. For example, many noncitizens are disqualified from eligibility for cancellation of removal based on relatively minor past criminal offenses. Even noncitizens who are lawful permanent residents are ineligible for cancellation if they have been convicted of an "aggravated felony," a category that in fact sweeps in many "non-violent, fairly trivial misdemeanors." Hon. Dana Leigh Marks, Hon. Denise Noonan Slavin, *A View Through the Looking Glass: How Crimes Appear from the Immigration Court Perspective*, 39 FORDHAM URB. L.J. 91, 92 (2011); *see also* AMERICAN IMMIGRATION COUNCIL, AGGRAVATED FELONIES: AN OVERVIEW (Dec. 16, 2016), https://www.americanimmigrationcouncil.org/research/aggravated-felonies-overview (noting that "an 'aggravated felony' does not require the crime to be 'aggravated' or a 'felony,'" but instead "includes many nonviolent and seemingly minor offenses"). And

noncitizens who are not lawful permanent residents are rendered ineligible by an even broader range of criminal offenses. 8 U.S.C. § 1229b(b)(1)(C).

The requisite "hardship" showing is also exceedingly demanding. As interpreted by the BIA, exceptional and extremely unusual hardship requires that hardship "to the alien's relatives . . . must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." *In re Monreal-Aguinaga*, 23 I. & N. Dec. at 62 (quoting H.R. Rep. No. 104-828, at 213 (1996)). The BIA has emphasized that this standard of hardship "is significantly more burdensome than the former 'extreme hardship' standard," and adjudicators have declined to find requisite hardship in a number of sympathetic situations. *In re Andazola-Rivas*, 23 I. & N. Dec. 319, 322 (BIA 2002).

In short, the only individuals for whom the stop-time rule makes a difference are those, like Mr. Pereira, who are the most deserving. Pet. at 16. For many of those individuals, cancellation is their only realistic chance at securing relief from removal. The question presented therefore governs whether lawful residents and citizens of this country are going to lose loved ones who have lived in this country for over a decade based on an incorrect interpretation of a statute. And correcting the widespread misapplication of the stop-time rule will not result in a windfall for immigrants—it will merely ensure the most deserving have an opportunity to make their case for relief. This Court should grant certiorari to correct the clear misreading of the INA perpetuated by the decision below.

III. THE DECISION BELOW IS BASED ON A CLEAR MISREADING OF THE PLAIN TEXT OF THE INA

There are many areas of legitimate complexity and ambiguity in the statutory labyrinth of our country's immigration scheme. *See, e.g.*, *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2194 (2014) (finding ambiguity regarding whether BIA should permit the issuance of visas for adults who initially qualified for visas as children but "aged out" under § 1153(h)(3)); *Holder v. Martinez Gutierrez*, 566 U.S. 583, 590 (2012) (finding ambiguity regarding whether BIA should impute parent's years of continuous residence on child under § 1229b(a)). The issue before the Court here, however, is simply not one of them.

As the petition details, the question of statutory interpretation at issue here is straightforward: Whether the government can trigger the stop-time rule, cutting off a noncitizen's period of continuous residence, by serving a "notice to appear under section 1229(a)," 8 U.S.C. § 1229b(d)(1), that lacks section 1229(a)'s statutorily mandated definition of what constitutes a notice to appear. The plain text of § 1229b(d)(1) provides a clear answer: The government can only effectively trigger the stop-time rule by serving a "notice to appear *under section 1229(a)*." *Id.* Section 1229(a) defines a "notice to appear" as "written notice . . . specifying" certain information, including the "time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1).

The BIA's clumsy attempt to twist this clear statutory mandate into ambiguity is erroneous, and the First Circuit's deference to this misreading of the

plain text is misguided. The government's interpretation reads the "specifying" clause out of the statute, and necessarily means that a "written notice" of *anything or nothing at all* would qualify as a "notice to appear under section 1229(a)." In response to the Third Circuit's observation of those absurd implications, the First Circuit suggested that *some* of the information "specified" in section 1229(a) might be required, just not the date and time of the removal hearing. Pet. App. 8a-9a n.5. But there is no textual basis whatsoever for that suggestion; the "specifying" clause either has force or not, and both basic principles of statutory interpretation and common sense dictate that it does.

The government's reading also creates perverse incentives: If the government can stop the clock on the continuous residence requirement by sending a document without a hearing date, it reduces the imperative to calendar matters and move the process along. That incentive to delay is especially concerning in light of the absence of any legal requirement ensuring prompt proceedings. *Supra* at 7-8.

The government's position disregards basic principles of statutory interpretation, with significant practical consequences for thousands of noncitizens, their families, and their communities. This Court should intervene to ensure that the fate of thousands of noncitizens and their families is not left to an arbitrary matter of geography, and reverse the decision below.

CONCLUSION

For all these reasons, as well as those presented in the petition for certiorari, the petition should be granted.

Respectfully submitted,

MARK BARR
LICHTER IMMIGRATION
1601 Vine Street
Denver, CO 80206
(303) 554-8400

Counsel for the American Immigration Lawyers Association

BRADLEY N. GARCIA
(*Counsel of Record*)
bgarcia@omm.com
JEREMY MALTBY
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Amicus Curiae

October 30, 2017

No. 17-459

IN THE

Supreme Court of the United States

WESCLEY FONSECA PEREIRA,

Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

JOINT APPENDIX

WILLIAM M. JAY
Counsel of Record
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinlaw.com
(202) 346-4000

Counsel of Record for Petitioner

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
DEPARTMENT OF JUSTICE
Washington, DC 20530
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Counsel of Record for Respondent

PETITION FOR WRIT OF CERTIORARI FILED: SEPT. 27, 2017
CERTIORARI GRANTED: JAN. 12, 2018

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Bd. of Immigration Appeals Decision .... Pet. App. 17a

Immigration Judge Decision ..... Pet. App. 20a

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 16-1033

WESCLEY FONSECA PEREIRA,

Petitioner

v.

LORETTA E. LYNCH, Attorney General
Terminated: 07/31/2017

JEFFERSON B. SESSIONS, III, Attorney General

Respondent

DOCKET ENTRIES

Date	Docket Text
01/06/2016	AGENCY CASE docketed. Petition for review filed by Petitioner Wescley Fonseca Pereira. Appearance form due 01/20/2016. Administrative record due 02/16/2016. Copy of petition served on respondent(s) pursuant to FRAP 15(c). [16-1033] (CP) [Entered: 01/06/2016 02:35 PM]

* * *

Date	Docket Text
01/22/2016	ADMINISTRATIVE record filed. [16-1033] (CP) [Entered: 01/22/2016 02:34 PM]
	* * *
05/03/2016	PETITIONER'S BRIEF filed by Petitioner Wescley Fonseca Pereira. Certificate of service dated 05/02/2016. Brief due 06/06/2016 for RESPONDENT Loretta E. Lynch. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 05/10/2016. [16-1033] (AP) [Entered: 05/03/2016 10:07 AM]
	* * *
06/15/2016	RESPONDENT'S BRIEF filed by Respondent Loretta E. Lynch. Certificate of service dated 06/06/2016. Reply brief due 06/23/2016 for PETITIONER Wescley Fonseca Pereira. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 06/22/2016. [16-1033] (AP) [Entered: 06/15/2016 04:57 PM]

Date	Docket Text
	* * *
08/03/2016	CASE calendared: Tuesday, 09/13/2016 Boston, MA Panel Courtroom. Designation form due 08/17/2016. [16-1033] (DT) [Entered: 08/03/2016 04:22 PM]
08/17/2016	ORDER entered by Sandra L. Lynch, Appellate Judge: On or before **August 24, 2016**, the parties are directed to file a written response advising the court of the status of any application by petitioner for relief under the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. Response due 08/24/2016 for Loretta E. Lynch and Wescley Fonseca Pereira. [16-1033] (DO) [Entered: 08/17/2016 03:58 PM]
	* * *
08/23/2016	RESPONSE filed by Petitioner Wescley Fonseca Pereira to order notifying party of opportunity to respond [6026111-2], order [6026111-3]. Certificate of service dated 08/23/2016. [16-1033]. CLERK'S NOTE: Docket entry selected the wrong filer. Please disregard. (SP) [Entered: 08/23/2016

Date	Docket Text
	11:41 AM]
	* * *
08/23/2016	RESPONSE filed by Respondent Loretta E. Lynch to order notifying party of opportunity to respond [6026111-2], order [6026111-3]. Certificate of service dated 08/23/2016. [16-1033] (SP) [Entered: 08/23/2016 11:44 AM]
	* * *
08/30/2016	RESPONSE filed by Petitioner Wescley Fonseca Pereira to response [6028878-2], response [6027179-2], order notifying party of opportunity to respond [6026111-2], order [6026111-3], response [6027030-2]. Certificate of service dated 08/30/2016. [16-1033] (JBR) [Entered: 08/30/2016 09:40 AM]
09/13/2016	CASE argued. Panel: Sandra L. Lynch, Appellate Judge; Kermit V. Lipez, Appellate Judge and Rogeriee Thompson, Appellate Judge. Arguing attorneys: Jeffrey Brian Rubin for Wescley Fonseca Pereira and Sarah Pergolizzi for Loretta E. Lynch. [16-1033] (DT) [Entered: 09/13/2016

Date	Docket Text
	12:25 PM]
11/07/2016	LETTER regarding *Answer to question at argument regarding NTA procedures in the Third Circuit* filed by Attorney Sarah Pergolizzi for Respondent Loretta E. Lynch. Certificate of service dated 11/07/2016. [16-1033] (SP) [Entered: 11/07/2016 10:39 AM]
07/31/2017	OPINION issued by Sandra L. Lynch, Appellate Judge; Kermit V. Lipez, Appellate Judge and Rogeriee Thompson, Appellate Judge. Published. [16-1033] (CP) [Entered: 07/31/2017 03:38 PM]
07/31/2017	JUDGMENT. Denied [16-1033] (CP) [Entered: 07/31/2017 03:49 PM]
09/25/2017	MANDATE issued. [16-1033] (TS) [Entered: 09/25/2017 10:30 AM]
09/28/2017	U.S. SUPREME COURT NOTICE advising a petition for a writ of certiorari was filed on 09/27/2017 and assigned case number 17-459. [16-1033] (CP) [Entered: 10/02/2017 09:16 AM]
01/12/2018	U.S. SUPREME COURT ORDER entered on 01/12/2018. The petition

Date	Docket Text
	for a writ of certiorari was granted. [16-1033] (CP) [Entered: 01/18/2018 12:24 PM]

U.S. Department of Justice
Immigration and Naturalization Service

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act

File No: A096 416 756
Case No: XBO0605000091

In the Matter of:

Respondent: Wescley Fonseca PEREIRA currently residing at:

19 BARLING AVE.
OAK BLUFFS MASSACHUSETTS 02557
(Number, street, city state and ZIP code)

774 836 8485
(Area code and phone number)

☐ 1. You are an arriving alien.

☐ 2. You are an alien present in the United States who has not been admitted or paroled.

☒ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

1) You are not a citizen or national of the United States;

2) You are a native of BRAZIL and a citizen of BRAZIL;

3) You were admitted to the United States at Miami, FL on or about June 22, 2000 as a nonimmigrant visitor with authorization to remain in the United States for a temporary period not to exceed December 21, 2000;

4) You remained in the United States beyond December 21, 2000 without authorization from the Immigration and Naturalization Service.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237(a)(1)(B) of the Immigration and Nationality Act (Act), as amended, in that after admission as a nonimmigrant under Section 101(a)(15) of the Act, you have remained in the United States for a time longer than permitted, in violation of this Act or any other law of the United States.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to:
☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: JFK Federal Building 15 New Sudbury Street Room 320 Boston MASSACHUSETTS US 0220
(Complete Address of Immigration Court, Including Room Number, if any)

on a date to be set at a time to be set to show why
(Date) (Time)
you should not be removed from the United States based on the charge(s) set forth above.

RICHARD DEASY
SUPERVISORY SPECIAL AGENT
(Signature and Title of Issuing Officer)

Date: 5/31/06 Boston, MA
(City and State)

See reverse for important information

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the

Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration

judge in your absence, and you may be arrested and detained by the INS.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

_____

(Signature of Respondent)

Before:

_____

(Signature und Title of INS Officer)

Date: _____

Certificate of Service

This Notice to Appear was served on the respondent by me on May 31, 2006, in the following manner and in compliance with section 239(a)(1)(F) of the Act:

☒ in person
☐ by certified mail, return receipt requested
☐ by regular mail
☐ Attached is a credible fear worksheet.
☒ Attached is a list of organizations and attorneys which provide free legal services.

The alien was provided oral notice in the *English* language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

Wescley F. Pereira
(Signature of Respondent if Personally Served)

ELIZABETH POLEET *Elizabeth Poleet*
SPECIAL AGENT
(Signature and Title of Officer)

Form I-862 (Rev. 3/22/99)N

NOTICE OF HEARING IN REMOVAL PROCEEDINGS
IMMIGRATION COURT
JFK FEDERAL BLDG., ROOM 320
BOSTON, MA 02203

RE: PEREIRA, WESCLEY FONSECA
FILE: A96-416-756

DATE: Sep 21, 2007

TO:

PEREIRA, WESCLEY FONSECA
19 BARLING AVE
OAK BLUFFS, MA 02557

Please take notice that the above captioned case has been scheduled for a MASTER hearing before the Immigration Court on Oct 31, 2007 at 09:30 A.M. at:

JFK FEDERAL BLDG., ROOM 320
BOSTON, MA 02203

You may be represented in these proceedings, at no expense to the Government, by an attorney or other individual who is authorized and qualified to represent persons before an immigration Court. Your hearing date has not been scheduled earlier than 10 days from the date of service of the Notice to Appear in order to permit you the opportunity to obtain an attorney or representative. If you wish to be represented, your attorney or representative must

appear with you at the hearing prepared to proceed. You can request an earlier hearing in writing.

Failure to appear at your hearing except for exceptional circumstances may result in one or more of the following actions: (1) You may be taken into custody by the Department of Homeland Security and held for further action. OR (2) Your hearing may be held in your absence under section 240(b)(5) of the Immigration and Nationality Act. An order of removal will be entered against you if the Department of Homeland Security established by clear, unequivocal and convincing evidence that a) you or your attorney has been provided this notice and b) you are removable.

IF YOUR ADDRESS IS NOT LISTED ON THE NOTICE TO APPEAR, OR IF IT IS NOT CORRECT, WITHIN FIVE DAYS OF THIS NOTICE YOU MUST PROVIDE TO THE IMMIGRATION COURT BOSTON, MA THE ATTACHED FORM EOIR-33 WITH YOUR ADDRESS AND/OR TELEPHONE NUMBER AT WHICH YOU CAN BE CONTACTED REGARDING THESE PROCEEDINGS. EVERYTIME YOU CHANGE YOUR ADDRESS AND/OR TELEPHONE NUMBER, YOU MUST INFORM THE COURT OF YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER WITHIN 5 DAYS OF THE CHANGE ON THE ATTACHED FORM EOIR-33. ADDITIONAL FORMS EOIR-33 CAN BE OBTAINED FROM THE COURT WHERE YOU ARE SCHEDULED TO APPEAR. IN THE EVENT YOU ARE UNABLE TO OBTAIN A FORM EOIR-33, YOU MAY PROVIDE THE COURT IN WRITING WITH YOUR NEW

ADDRESS AND/OR TELEPHONE NUMBER BUT YOU MUST CLEARLY MARK THE ENVELOPE "CHANGE OF ADDRESS." CORRESPONDENCE FROM THE COURT, INCLUDING HEARING NOTICES, WILL BE SENT TO THE MOST RECENT ADDRESS YOU HAVE PROVIDED, AND WILL BE CONSIDERED SUFFICIENT NOTICE TO YOU AND THESE PROCEEDINGS CAN GO FORWARD IN YOUR ABSENCE.

A list of free legal service providers has been given to you. For information regarding the status of your case, call toll free 1-800-898-7180 or 703-305-1662.

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:
(MAIL (M)) PERSONAL SERVICE (P)

TO: [✓] ALIEN [ ] ALIEN c/o Custodial Officer
[ ] ALIEN's ATT/REP [✓] DHS

DATE: *9/21/07* BY: COURT STAFF *PC*

Attachments: [✓] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
JFK FEDERAL BLDG., ROOM 320
BOSTON, MA 02203

In the Matter of: PEREIRA, WESCLEY FONSECA	Case No.: A96-416-756
RESPONDENT	Docket: BOSTON, MASSACHUSETTS IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

On Oct, 31, 2007, at 9:30 AM, pursuant to proper notice, the above entitled matter was scheduled for a hearing before an Immigration Judge for the purpose of hearing the merits relative to the RESPONDENT request for relief from removal. However,

(X) the respondent was not present.

( ) the respondent's representative was present; however, the respondent was not present.

( ) neither the respondent nor the respondent's representative was present.

Therefore, in the absence of any showing of good cause for the respondent's failure to appear at the

hearing concerning the request for relief, I find that the respondent has abandoned any and all claim(s) for relief from removal.

Wherefore, the issue of removability having been resolved, it is HEREBY ORDERED for the reasons set forth in the Immigration and Naturalization Service charging document that the respondent be removed from the United States to BRAZIL.

Matthew J. D'Angelo
MATTHEW J. D'ANGELO
Immigration Judge
Date: Nov 6, 2007

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M)
PERSONAL SERVICE (P)

TO: (*M*) ALIEN ( ) ALIEN c/o Custodial Officer
( ) Alien's ATT/REP (*P*) DHS

Date: *11-6-07* BY: COURT STAFF *MLT*

Attachments: ( )EOIR-33 ( ) EOIR-28
( ) Legal Services List ( ) Other

Form EOIR 36 – 7T (FTA)

Paulo J. Moura
15 Main St. Ext. Ste. 5
Plymouth MA 02360

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

Boston

In Re the Matter of:	)	
	)	File No. A# 096-416-756
Wescley Fonseca Pereira	)	Before Hon. Judge
Respondent,	)	D'Angelo
	)	
In Removal Proceedings	)	*Detained--Bristol County*

MOTION TO REOPEN
IN-ABSENTIA ORDER OF REMOVAL OF
OCTOBER 31, 2007

Now comes the respondent in the above referenced matter and respectfully requests this Honorable Court to re-open it's "In Absentia" Order of June 8, 2010, pursuant to INA ss. 240(b)(5)(c)(ii) as respondent, did not voluntarily evade notice of said proceedings where ICE prepared the Notice to Appear incompletely indicating the "physical residential address" of 19 Barling Ave, Oak Bluffs MA instead of the actual "mailing address" of P.O. Box 4521 Vineyard Haven, MA 02568 as stated and sworn in respondent's attached affidavit in support of this motion. Exhibit A: "Notice to Appear." This is

not an uncommon error which causes many residents of Martha's Vineyard to inadvertently fail to appear. Please refer to his Sovereign Bank statement attached as Exhibit B, personal correspondence attached as Exhibit C, and 2011 federal tax return attached as Exhibit D, as evidence of his mailing address.

The Respondent is the father of K F , a four year-old U.S. citizen. Exhibit E (birth certificate); Exhibit F (family photograph). The Respondent's wife, Sandra Gomes, is in the final trimester of her second pregnancy and has a due date of May 17. Exhibit G. Because Ms. Gomes is eight months pregnant, she is unable to work and relies on the Respondent to provide food and pay the household's bills.

Mr. Pereira did not intend to evade his NTA. On the contrary, the Respondent is an honest and upright person who works hard as a painter, mover, and other labors. He pays his taxes. Exhibit D. He is well-known on Martha's Vineyard, and many members of the community including lawyers, small business owners, and family friends have written to Your Honor to express their solidarity with Mr. Pereira. See Exhibit H ("very reliable... extremely honest and trustworthy at all times and I do not hesitate to vouch for him. "A wonderful person... he has many friends who are fortunate to know him." "He deserves another opportunity to do what is best for his family." "He is as honest as anyone and would do anything for anyone...").

Prior to submitting this Motion to Reopen, the Respondent's counsel conducted a case file review via the Clerk's Office and have confirmed that both the "Notice to Appear" and the "In Absentia Order of Removal" were both returned as "**undeliverable**."

Mr. Pereira came to contact with Immigration authorities after he was arrested for OUI in Tisbury, Massachusetts on May 30, 2006. However he completed his probation through Tisbury District Court, including extended probation, and his probation was terminated on July 30, 2008. Because of his successful completion of probation he was released without serving a potential 150-day sentence in the House of Correction.

In light of Mr. Pereira's circumstances, including soon-to-be second baby on the way and his excellent standing in the Martha's Vineyard, we ask Your Honor to give Mr. Pereira the chance to comply fully with immigration proceedings, including the opportunity to seek reasonable relief, prosecutorial discretion, or release on bond. Exhibit I, Docket 635-CR-458.

Wherefore, the Respondent asks that his Motion to Reopen the In-Absentia Order of Removal of October 31, 2007 be allowed in light of the above lack of notice. Until a final decision, please stay all deportation orders until a final determination is made per this Motion. I did in good faith contact DHS Counsel *"duty attorney"* and where time is of the essence do herein file the MOTION TO RE-OPEN without a position taken (to date) by DHS on *MARCH 28, 2013.*

Respectfully submitted,

Paulo J. Moura 3/28/2013

Paulo J. Moura, Esq.
BBO N0.567596
15 Main Street, Extension
Suite 5
Plymouth, MA 02360
Phone:(508)747-0111
Fax: (508)747-7666
Cell: (617)688-6634

March, 18 2013

To Whom it may concern.

I Sandra Gomes Wife of Wescley Pereira want to ask whoever can help me with my husband situation we are together for 8 years, we have a beautiful daughter who is four and was born in the USA, and we are expecting another baby on the way, I am almost 8 month of pregnant and I am not working, he is the one that pays the bills, the food and everything also. He is a very good worker, responsible, Honest and a good Husband.

I don't know how I am going to do if he's not here to help me. He is a great Husband excellent father a man with a huge heart.

Please help me.

Thank you.

Sandra Gomes

March 18, 2013

To Whom it May Concern:

I have known Wes Pereira for at least eight (8) years. He, his companion and daughter have resided in a rental house that I own for the last four (4) years. Wes has proven himself to be a very reliable individual. Not only is he responsible in taking care of the house he pays his rent in advance, no later than the 2nd of every month.

Wes is a hard worker as a house painter and has performed various jobs for me in that capacity. In addition to his house painting he also helps my wife by moving furniture and furnishings in and out of her antique store and by making deliveries of same with a friend of his.

As I have stated above, I find Wes to be reliable, responsible, extremely honest and trust worthy at all times and I do not hesitate to vouch for him.

Very truly yours,

* * *

March 18, 2013

To Whom It May Concern,

I am writing on behalf of my good neighbor, Wescley Pereira. Wescley has been my neighbor for four years. Wescley is a wonderful person. Wescley is friendly, thoughtful and very trusting. He goes out of his way to help not just his neighbors, but everyone that he can.

Wescley has recently painted my house for me. He is trustworthy and reliable. Importantly, Wescley can be counted on. He has a tremendous work ethic and along with that, he makes sure that things are done correctly. He always takes care of both his professional and personal responsibilities.

Wescley has a wonderful family and he is a great father to his 4-year-old daughter, K and husband to his loving wife, Sandra. He is soon to become a new proud father again this May. He loves his family very much and is always there for them. Additionally, he loves and cares for his Boston Terrier.

As a teacher at The Edgartown School for 23 years, I can say in all honesty that Wescley is an honorable person. Wescley has many friends who are fortunate to know him, as he is someone you can depend on and he is someone who puts others first before himself.

If I can be of more help in describing Wescley as a wonderful family man, hard worker, or good friend

and neighbor, I would be most happy to provide it for you.

I am fortunate to be a friend and neighbor of such a good person. Wescley has his priorities in the right place.

Sincerely yours,

* * *

3/18/13
To Whom It May Concern:

I have known Wescley Pereira and his wife, Sandra, since I moved to the island seven years ago. I write to assure that they are both fine, upstanding individuals and good parents to their daughter.

I have been a licensed social worker since 1968, and now work for hospice here on the island. I would be happy to vouch for Wescley at any time.

Sincerely yours,

* * *

* * *

March 18, 2013

To whom it may concern:

I have just been told that Wescley Pereira has been detained by Immigration. I have known Wes for a number of years and found him to be a very caring & giving individual. I think he is as honest as they come and would do anything for anyone with a simple request.

If anyone deserves another chance to make a life for himself and his family, it would be Wes. I have never heard him speak a cross word about anyone.

* * *

To Whom it may concern: March 18, 2013

It has come to my knowledge that Wescley Pereira has been detained as an illegal alien. I have known Wescley for at least ten years and in that time have always found him to be an honest and upright person. He would never do harm to anyone. He deserves another opportunity to do what is best for him and his family.

Wes has always worked hard in the paint trade with a friendly disposition and a warm heart. I hope that you can see the goodness in him and in all fairness, release him.

Sincerely,

* * *

30

March, 18 2013

To Whom it may concern.

I * * * would like to say that I know Wescley Pereira from the Island of Martha's Vineyard.

I know him probability about six years, we go to the same church together, he is a wonderful person, he is Married to a friend of my also Sandra and they have a daughter who was born in the USA she is four.

Sandra who is Wescley wife is now pregnant for about eight month. He is a great worker doing paint. He's very honest, and also with a lot of responsibility at his work, at his home. Wescley have a beautiful Family and he takes a great care of them.

Any thing also I'll be happy to help Wescley.

* * *

March 18, 2013

Dear Attorney Paulo Moura,

This is to attest to the character of Wescley F. Pereira.

He is a dependable, hard working young man who I have known for approximately 10 years. We became acquainted through work, which he has performed at my home (in Vineyard Haven) for many years. His professionalism impressed me from the start. Wes completes his work in a timely manner; therefore, I have relied on him over the years and have become accustomed to his dependability. Wes has a warm, polite, gentle manner. He is a wonderful, dedicated father and gentle husband who frequently speaks proudly of his young daughter and lovely wife.

It is also comforting to have Wes as a neighbor. I have depended on Wes when emergencies arise and at times this is at a moment's notice. If Wescley says that he will do something you can be assured that it will happen.

I have admired Wes not only for the high quality of his work and work ethic but also for his seriousness regarding his family and keeping himself in good health and maintaining balance in his life. Wes is frequently at the gym at 6am and on a weekend he can be found playing with his daughter. He is a sincere and proud family man as well as a thoughtful neighbor.

It is difficult to find outstanding young men such as Wes and it is a pleasure to know him. I always look forward to seeing Wes both in the neighborhood and in my home. His smile places me at ease and I can feel completely confident that he will take care of the situation at hand. He is a kind, thoughtful, gentle young man who can be relied on to do what he says and fulfill his responsibilities towards his family and friends. He is a great guy and contributes in a very positive way to our community. Without a doubt, Wes will go above and beyond to fulfill his responsibilities and I would strongly recommend his to my friends and associates as a sincere, honorable, reliable young man.

Sincerely,

* * *

Clinical Assistant Professor

* * * UMass

* * *

NOTICE OF HEARING IN REMOVAL PROCEEDINGS
IMMIGRATION COURT
JFK FEDERAL BLDG., ROOM 320
BOSTON, MA 02203

RE: PEREIRA, WESCLEY FONSECA
FILE: A096-41S-756

DATE: Apr 4, 2013

TO: MOURA & MOURA
MOURA, PAULO JOSE
15 MAIN ST, EXT. SUITE #5
PLYMOUTH, MA 02360

Please take notice that the above captioned case has been scheduled for a MASTER hearing before the Immigration Court on Apr 8, 2013 at 08:30 A.M. at:

15 NEW SUDBURY STREET
BOSTON, MA 02203

You may be represented in these proceedings, at no expense to the Government, by an attorney or other individual who is authorized and qualified to represent persons before an Immigration Court. Your hearing date has not been scheduled earlier than 10 days from the date of service of the Notice to Appear in order to permit you the opportunity to obtain an attorney or representative. If you wish to be represented, your attorney or representative must appear with you at the hearing prepared to proceed. You can request an earlier hearing in writing.

Failure to appear at your hearing except for exceptional circumstances may result in one or more of the following actions: (1) You may be taken into custody by the Department of Homeland Security and held for further action. OR (2) Your hearing may be held in your absence under section 240(b)(5) of the Immigration and Nationality Act. An order of removal will be entered against you if the Department of Homeland Security established by clear, unequivocal and convincing evidence that a) you or your attorney has been provided this notice and b) you are removable.

IF YOUR ADDRESS IS NOT LISTED ON THE NOTICE TO APPEAR, OR IF IT IS NOT CORRECT, WITHIN FIVE DAYS OF THIS NOTICE YOU MUST PROVIDE TO THE IMMIGRATION COURT BOSTON, MA THE ATTACHED FORM EOIR-33 WITH YOUR ADDRESS AND/OR TELEPHONE NUMBER AT WHICH YOU CAN BE CONTACTED REGARDING THESE PROCEEDINGS. EVERYTIME YOU CHANGE YOUR ADDRESS AND/OR TELEPHONE NUMBER, YOU MUST INFORM THE COURT OF YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER WITHIN 5 DAYS OF THE CHANGE ON THE ATTACHED FORM EOIR-33. ADDITIONAL FORMS EOIR-33 CAN BE OBTAINED FROM THE COURT WHERE YOU ARE SCHEDULED TO APPEAR. IN THE EVENT YOU ARE UNABLE TO OBTAIN A FORM EOIR-33, YOU MAY PROVIDE THE COURT IN WRITING WITH YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER BUT YOU MUST CLEARLY MARK THE ENVELOPE

"CHANGE OF ADDRESS." CORRESPONDENCE FROM THE COURT, INCLUDING HEARING NOTICES, WILL BE SENT TO THE MOST RECENT ADDRESS YOU HAVE PROVIDED, AND WILL BE CONSIDERED SUFFICIENT NOTICE TO YOU AND THESE PROCEEDINGS CAN GO FORWARD IN YOUR ABSENCE.

A list of free legal service providers has been given to you. For information regarding the status of your case, call toll free 1-800-898-7180 or 240-314-1500. For information on Immigration Court procedures, please consult the Immigration Court Practice Manual, available at www.usdoj.gov/eoir.

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:
MAIL (M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[✓] ALIEN's ATT/REP [✓] DHS

DATE: *4-4-2013* BY: COURT STAFF *DM*

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

NOTICE TO EOIR: ALIEN ADDRESS

Date:	04/08/2013
To:	Enter Name of BIA or Immigration Court 1-830 BOS
	Enter BIA or Immigration Court Three Letter Code@usdoj.gov BOS
From:	Enter Name of ICE Office BOSTON ERO
	Enter Street Address of ICE Office 10 New England Executive Park
	Enter City, State and Zip Code of ICE Office Burlington, MA 01803
Respondent:	Enter Respondent's Name Wescley Fonseca-Pereira
	Alien File No: Enter Respondent's Alien Number A96 416 756

* * *

Upon release from ICE custody, the respondent reported his/her address and telephone number would be:

Enter Respondent's Street Address 96 WEST

TISBURY RD

Enter Respondent's City, State and Zip Code
EDGARTOWN, MA 02539

Enter Respondent's Telephone Number (including area code) 508 560 2502

☐ I hereby certify that the respondent was provided an EEOIR-33 Form and notified that they must inform the Immigration Court of any further change of address.

ICE Official: Enter Your First, Last Name and Title
Kathleen Karaba, Enforcement and Removal Assistant

United States Department of Justice Executive
Office for Immigration Review Immigration Court
Boston, MA 02203

In the Matter of: Wescley Fonesca Pereira
File No: A – 096-416-756

In Removal Proceedings

RESPONDENT'S WRITTEN PLEADING

On behalf of my client, I make the following representations:

1. The respondent concedes proper service of the Notice to Appear, dated 05/31/06.

2. I have explained to the respondent (through an interpreter, if necessary):

   a. the rights set forth in 8 C.F.R. § 1240.10(a);

   b. the consequences of failing to appear in court as set forth in INA § 240(b)(5);

   c. the limitation on discretionary relief for failure to appear set forth in INA § 240(b)(7);

   d. the consequences of knowingly filing or making a frivolous application as set forth in INA § 240(d)(6);

   e. the requirement to notify the court within five days of any change of address or

telephone number, using Form EOIR-33/IC pursuant to 8 C.F.R. § 1003.15(d).

3. The respondent concedes the following allegation(s) *1-4*, and denies the following allegation(s) *NONE.*.

4. The respondent concedes the following charge(s) of removability *237(a)(1)(B)*, and denies the following charge(s) of removability *NONE.*

5. In the event of removal, the respondent:

☒ names Brazil as the country to which removal should be directed:

OR

☐ declines to designate a country of removal.

6. The respondent will be applying for the following forms of relief from removal:

☐ Termination of Proceedings

☐ Asylum

☐ Withholding of Removal(Restriction on Removal)

☐ Adjustment of Status

☒ Cancellation of Removal pursuant to INA § 240A(b)

☐ Waiver of Inadmissibility pursuant to INA § _____

☒ Voluntary Departure

☒ other (specify) *prosecutorial discretion*

☐ None

7. If the relief from removal requires an application, the respondent will file the application (other than asylum), no later than **fifteen (15) days** before the date of the individual calendar hearing, unless otherwise directed by the court. The respondent acknowledges that, if the applications) are not timely filed, the application(s) will be deemed waived and abandoned under 8 C.F.R. § 100331(c).

   If the respondent is filing a defensive asylum application, the asylum application will be filed in open court at the next master calendar hearing.

8. If background and security investigations are required, the respondent has received DHS biometrics instructions and will timely comply with the instructions. I have explained the instructions to the respondent(through an interpreter, if necessary), that, under 8 C.F.R. § 1003.47(d), failure to provide biometrics or other biographical information within the time allowed will constitute abandonment of the application unless the respondent

demonstrates that such failure was the result of good cause.

9. The respondent estimates that *2* hours will be required for the respondent to present the case.

10. ☒ It is requested that the Immigration Court order an interpreter proficient in the *Portuguese* language, _____ dialect;

OR

☐ The respondent speaks English and does not require the services of an interpreter.

5-8-13
Date

Jeffrey Rubin
Attorney Or
Representative for the
Respondent

RESPONDENT'S PLEADING DECLARATION

I, *Wescley F. Pereira,* have been advised of my rights in these proceedings by my attorney or representative. I waive further explanation of those rights by this court.

I have been advised by my attorney or representative of the consequences of failing to appear for a hearing. I have also been advised by my attorney of the consequences of failing to appear for a scheduled date of departure of deportation. I understand those consequences.

I have been advised by my attorney or representative of the consequences of knowingly filing a frivolous asylum application. I understand those consequences.

I have been advised by y attorney or representative of the consequences of failing to follow the DHS biometrics instructions within the time allowed. I understand those consequences.

I understand that if my mailing address changes I must notify the court within 5 days of such change by completing an Alien's Change of Address Form(Form EOIR-33/IC0 and filing it with this court.

Finally, my attorney or representative has explained to me what this Written Pleadings says. I understand it I agree with it, and I request that the court accept it as my pleading.

_____ _____

Date Respondent

CERTIFICATE OF INTERPRETATION

I, _____, am competent to translate and interpret from
(name of interpreter)

_____ into English, and I certify that I have read this entire document
(name of language)

to the respondent in _____, and that the respondent stated that he or she
(name of language)

understood the document before he or she signed the Pleading Declaration above.

_____
(signature of interpreter)

_____
(typed/printed name of interpreter)

U.S. Department of Justice
Executive Office for Immigration Review
United States Immigration Court

In the Matter of		File: A096-416-756
WESCLEY FONSECA PEREIRA	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	Transcript of Hearing

Before LEONARD I. SHAPIRO, Immigration Judge

Date: July 10, 2014 Place: BOSTON, MASSACHUSETTS

Transcribed by FREE STATE REPORTING, Inc.-2

Official Interpreter:

Language:

Appearances:

For the Respondent: ASHLEY M. EDENS

For the DHS: MARNA M. RUSHER

* * *

JUDGE TO MR. PEREIRA

Judge D'Angelo had marked as Exhibit No. 1-A the notice of the hearing on October 31, 2007 that you missed. But you, you were not living in - at 19, what was it, 16 Barling Avenue?

MR. PEREIRA TO JUDGE

Yes, Your Honor, and can I say something?

JUDGE TO MR. PEREIRA

Yes, sure, go ahead.

MR. PEREIRA TO JUDGE

Excuse me. We live in Martha's Vineyard. And when I came here the first time they say —

JUDGE TO MR. PEREIRA

You need to make — move —

MR. PEREIRA TO JUDGE

We live in Martha's Vineyard--

JUDGE TO MR. PEREIRA

Yes.

MR. PEREIRA TO JUDGE

— and I gave the p. o. box to - and Martha's Vineyard, they don't deliver the mail at house, at home, at a physical address and for me that's never came because Mrs. —

JUDGE TO MR. PEREIRA

Well, it's okay.

MR. PEREIRA TO JUDGE

— if I remember —

JUDGE TO MR. PEREIRA

Suffice it to say, sir, you didn't get the notice —

MR. PEREIRA TO JUDGE

No.

JUDGE TO MR. PEREIRA

- is that right?

MR. PEREIRA TO JUDGE

That's —

JUDGE TO MR. PEREIRA

Yes —

MR. PEREIRA TO JUDGE

— right.

JUDGE TO MR. PEREIRA

— that's okay. And I, as a result of that, I believe I reopened your case.

MR. PEREIRA TO JUDGE

Yes, sir.

JUDGE TO MR. PEREIRA

Is that right?

MR. PEREIRA TO JUDGE

Yes. And I called Mrs., if I remember Mrs. Bullet [phonetic sp.], who works here, and she say I'm should still waiting, that was in the end of —

JUDGE TO MR. PEREIRA

Well, I, I don't know —

MR. PEREIRA TO JUDGE

— 2006.

JUDGE TO MR. PEREIRA

— really what you're saying. So I don't know what that has to do with, what's that have to do with anything?

MR. PEREIRA TO JUDGE

No, I just tried to find out the date before with the number I have —

JUDGE TO MR. PEREIRA

Yes.

MR. PEREIRA TO JUDGE

— in hand.

JUDGE TO MR. PEREIRA

Well, I reopened the case anyway.

MR. PEREIRA TO JUDGE

Yes.

JUDGE TO MR. PEREIRA

So that, that — you're all set there.

MR. PEREIRA TO JUDGE

Okay.

JUDGE TO MR. PEREIRA

What's your address now?

MR. PEREIRA TO JUDGE

96 West Cheesburg [phonetic sp.] Road, Edgartown, Massachusetts.

JUDGE TO MR. PEREIRA

Edgartown, yes?

MR. PEREIRA TO JUDGE

Yes.

JUDGE TO MR. PEREIRA

Okay. You got the Notice to Appear, the first notice that was given to you on May 31, 2006, is that right?

MR. PEREIRA TO JUDGE

I, when arrested.

JUDGE TO MR. PEREIRA

Yes, they gave it to you, signed for it. Is that right?

MR. PEREIRA TO JUDGE

Yes.

JUDGE TO MR. PEREIRA

Yes, okay.

MR. PEREIRA TO JUDGE

Yes, Your Honor.

* * *

To Whom It May Concern:

I am writing on behalf of my neighbor and close friend Wescley Pereira who I have known for over 10 years.

Wescley is a kind and caring person. Wescley always thinks of others and cares about how everyone is doing. Wescley is always ready to help anyone in need and even if not, Wescley is always there anyway, as a friend and someone you can fully count on and trust.

I am fortunate to have friends and neighbors like Wescley and his family. Wescley, his wife Sandra, their five year old daughter K and their one year old baby daughter M L are a loving and gracious family, along with their adorable dog Jolie. I have been invited many times to their family functions such as birthdays and holiday celebrations. They are truly a lovely family who spend quality time together and also share family time with friends and neighbors.

Together they have become an integral part of our community in Edgartown. Wescley and his family have a long-standing and close connection in this community and it is important to share how much Wescley and his family are thought of by our community.

It is because I know Wescley as I do, as a wonderful family man, kind, considerate and trustworthy human being, that I convey this in a

way that expresses the kind of decent and dependable person Wescley is.

If you have any questions at all, please do not hesitate to contact me, as I will be happy to oblige.

Sincerely yours,

* * *

Teacher
The Edgartown School
Edgartown, MA

* * *

* * *

May 26, 2014

Re: Wescley Pereira

Dear Sir/Madame:

My name is * * *. I am a U.S. citizen and have lived on Martha's Vineyard for twenty-three years. I have been in the painting and landscaping business for the last sixteen years and have worked side by side with Wes for twelve years. Personally and professionally, Wes is a person that can be relied upon. He is willing to always lend a helping hand and always gives his best efforts. Wes is a responsible, diligent, and honest individual. He has worked extremely hard to create a better life for himself and his family.

Perhaps the best example of Wes' outstanding character is his influence and guidance of his older daughter, K . Wes has taught her to be polite, kind, and friendly. I am constantly amazed at how personable K is and I attribute that to the fine example that Wes sets. He is a reliable, supportive, and loving husband and father. He provides for his family and his absence would be a huge loss to his wife Sandra and his two little girls. Undoubtedly, Wes is irreplaceable to his family and our community.

Yours truly,

* * *

* * *

6/26/2014

To Whom it may concern,

My name is * * *. Wesley Perira has been a friend of my family for over 10 years. I know his wife Sandra and their 2 children K C and M L as well as their Boston terrier Joly.

Wesley has been a true and valued friend as he is loyal as the day is long. He is always pleasant and hardworking. He never hesitates to come help me out on my farm even when I call him last minute.

Wesley is a trusted and respected friend and it is a comfort to know I can always count on him to be there. I believe he is deserving of citizenship of this country.

Sincerely,

* * *

June 27, 2014

U.S. Citizen and Immigration Services
Boston, MA

Dear Sir/Madam

I hereby confirm that Wesley Pereira, his wife Sandra and daughters K and M L , reside at 96 West Tisbury Road, Edgartown, MA and have rented same for the past six years.

Wesley has always paid the rent in advance on the first of each month or before. He is a hard working individual and is very helpful to others. He has high morals and I do not hesitate to vouch for him. He is a credit to the community.

Very truly yours,

* * *

June 2, 2014

To whom it may concern,

Wesley Pereira is not just a worker for us but a friend, as well. You cannot help liking him and his lovely wife, Sandra Perira, and daughters K C and M L .

We have known him for many years. He is such a hard worker taking pride in everything he does. His work is always exceptional.

Recently I lost my husband and it is very difficult for a woman alone to care for a house and property. Wesley has been such a help to me in so many ways – always willing and sometimes just appearing and asking what he could do for me.

My friends and I would be lost without him. He is definitely one of a kind – so honest, trustworthy, cheerful, a true friend, and one of the best workers I have ever employed.

Most Sincerely,

* * *

June 9, 2014

To whom it may concern:

I have known Wesley Pereira for 8 years. He is a customer in the retail store in which I work. Wesley has always been pleasant and courteous. I have seen him with his family. He is a devoted husband to Sandra Pereira and a wonderful father to his two children, K C F and M L F . Wesley is an honest and hard working young family man.

Respectfully,

* * *

To whom it may concern:

I am writing on behalf of Wesley Pereira.

Wesley has been working for a friend for many years. He also helps me when I am in need of trustworthy. His character is beyond excellent and he's a very hard worker.

Wesley is a wonderful father and husband.

Sincerely,

* * *

DMM:MGL:EAR:SKP
39-36-4225

U.S. Department of Justice

Office of Immigration Litigation
Civil Division
P.O. Box 878, Ben Franklin Station
Washington, D.C. 2044

November 7, 2016

By Electronic Filing
Margaret Carter, Deputy Clerk
United States Court of Appeals for the First Circuit
John Joseph Moakley U.S. Courthouse
1 Courthouse Way
Boston, MA 02210

RE: *Wesley Fonseca Pereira v. Loretta Lynch, Attorney General*, No. 16-1033 (1st Cir. argued Sept. 13, 2016); Agency No. A096-416-756

Dear Ms. Carter:

During oral argument in the above-captioned case, the Court asked what procedures the government is following in cases that are affected by the Third Circuit's decision in *Orozco-Velasquez v. Att'y Gen.*, 817 F.3d 78 (3d Cir. 2016).

We shared the Court's inquiry with both the Executive Office for Immigration Review, which includes the Board of Immigration Appeals and

immigration courts, and with U.S. Immigration and Customs Enforcement (ICE), whose attorneys represent the Department of Homeland Security in administrative removal proceedings before the Board and immigration judges. We are advised that the general procedures for determining the date and time of removal hearings have not changed. *See* 8 C.F.R. § 1003.18. We are further advised, however, that both agencies are familiar with the Third Circuit's holding, and, following *Orozco-Velasquez*, ICE offices within the Third Circuit do not contend that service of the notice to appear activates the "stop-time" rule at 8 U.S.C. § 1229b(d)(1)(A) in similar cases in that circuit if the notice to appear does not include the hearing date and location.

Sincerely,

/s Sarah K. Pergolizzi
Trial Attorney
Office of Immigration Litigation
Civil Division, U.S. Dep't of Justice
P. O. Box 878, Ben Franklin Station
Washington, D.C. 20044
202-598-8769

via CM/ECF

cc: Jeffrey B. Rubin
Attorney for Petitioner
Three Center Plaza, Suite 400
Boston, MA 02108

No. 17-459

IN THE

Supreme Court of the United States

WESCLEY FONSECA PEREIRA,

Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF FOR PETITIONER

DAVID J. ZIMMER
ALEXANDRA LU
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210

JEFFREY B. RUBIN
TODD C. POMERLEAU
RUBIN POMERLEAU PC
3 Center Plaza, Ste. 400
Boston, MA 02108

WILLIAM M. JAY
Counsel of Record
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinlaw.com
(202) 346-4000

Counsel for Petitioner

February 21, 2018

QUESTION PRESENTED

The Attorney General can cancel removal of certain immigrants under 8 U.S.C. § 1229b(a) and (b). To be eligible for cancellation of removal, a non-permanent resident must have ten years of continuous presence in the United States, and a permanent resident must have seven years of continuous residence. *Id.* § 1229b(a)(2), (b)(1)(A). Under the "stop-time rule," those periods end when the government serves a "notice to appear under section 1229(a) of this title." *Id.* § 1229b(d)(1)(A). Section 1229(a) defines a "notice to appear" as "written notice . . . specifying" certain information, including "[t]he time and place at which the proceedings will be held." *Id.* § 1229(a)(1).

The question presented is:

Whether, to trigger the stop-time rule by serving a "notice to appear under section 1229(a)," the government must "specify" the items listed in § 1229(a)'s definition of a "notice to appear," including "[t]he time and place at which the proceedings will be held."

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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8 C.F.R. § 1003.15 14

8 C.F.R. § 1003.18(b) 5, 14, 17, 23, 50
8 C.F.R. § 1239.1(a) 14
8 C.F.R. § 1240.10(e) 54
Sup. Ct. R. 34.5 2

OTHER AUTHORITIES

62 Fed. Reg. 10,332 (Mar. 6, 1997) 14
H.R. Rep. No. 104-469 (1996) 12, 39, 41
S. Rep. No. 31-1515 (1950) 7
143 Cong. Rec. S12265
(daily ed. Nov. 9, 1997) 43

BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a) is reported at 866 F.3d 1. The decisions of the Board of Immigration Appeals (Pet. App. 17a) and the immigration judge (Pet. App. 20a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2017. The petition for a writ of certiorari was filed on September 27, 2017, and granted on January 12, 2018. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1229b(b)(1) provides in relevant part:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—
>
> > (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application * * * * .

8 U.S.C. § 1229b(d)(1) provides in relevant part:

> For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end

* * * when the alien is served a notice to appear under section 1229(a) of this title[1] * * * *.

8 U.S.C. § 1229(a)(1) provides:

> In removal proceedings under section 1229a of this title,[2] written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:
>
> (A) The nature of the proceedings against the alien.
>
> (B) The legal authority under which the proceedings are conducted.
>
> (C) The acts or conduct alleged to be in violation of law.
>
> (D) The charges against the alien and the statutory provisions alleged to have been violated.
>
> (E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1)

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[1] The version appearing in the United States Code uses "section 1229(a) of this title" in place of "section 239(a)" (of the Immigration and Nationality Act), as in the session law. *See* Violence Against Women Act of 2000, Pub. L. No. 106-386, Div. B, § 1506(b)(1), 114 Stat. 1527. Pursuant to this Court's Rule 34.5, this brief uses the codified version.

[2] The session law uses "section 240," rather than "section 1229a of this title." Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009-587.

and (ii) a current list of counsel prepared under subsection (b)(2).

(F)

(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)

(i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

The full text of Sections 1229 and 1229b, together with other relevant statutes and regulations, are reproduced in the appendix to this brief.

INTRODUCTION

Cancellation of removal is a critical form of immigration relief that prevents the break-up of immigrant families and allows the most deserving immigrants to remain in the country. To be eligible for cancellation, an immigrant must have been living in the United States for a specified number of years. The "stop-time rule" at issue in this case gives the government the power to end the period of qualifying residence by serving a specific document: a "notice to appear under section 1229(a) of this title." 8 U.S.C. § 1229b(d)(1). Section 1229(a), in turn, defines what a notice to appear is: it contains six specific pieces of information, two requirements for the immigrant to fulfill, and two admonitions about the immigration consequences of failure to meet the requirements.

The question in this case is whether notice that is *not* a "notice to appear" as that term is defined in section 1229(a) can nevertheless be a "notice to appear under section 1229(a)" for purposes of the stop-time rule. The answer to that question is, unambiguously, no. The statute's plain text—supported by its structure, its history, and accepted canons of statutory interpretation—provides that only notice that satisfies section 1229(a)'s definition of a "notice to appear" qualifies as a "notice to appear under section 1229(a)," triggering the stop-time rule and potentially barring access to this vital form of relief.

The Board of Immigration Appeals ("BIA") rejected that straightforward reading of the statute. *Matter of Camarillo*, 25 I. & N. Dec. 644 (BIA 2011). It largely ignored the statute's text, concluding, after cursory analysis, that the text is ambiguous. *Id.* at

647. Viewing that purported ambiguity as license to adopt a "reasonable" interpretation "within our adjudicative authority and administrative judgment," *id.* at 651, the BIA focused on accommodating the Department of Homeland Security ("DHS"). While the statute requires that a notice to appear include the "time and place at which the proceedings will be held," 8 U.S.C. § 1229(a)(1)(G)(i), DHS provides that information in a notice to appear only "*where practicable.*" 8 C.F.R. § 1003.18(b) (emphasis added). To accommodate this regulation, which makes optional what the statute makes mandatory, the BIA held that the statute imposes *no* "substantive requirements" concerning what notice the government must provide to trigger the stop-time rule—if the government serves something it calls a "notice to appear," that is enough, even if it is otherwise just a blank piece of paper. *Camarillo*, 25 I. & N. Dec. at 647. The court of appeals, applying *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), deferred to the BIA's decision. Pet. App. 6a-14a.

This Court should reverse the court of appeals and reject the BIA's attempt to rewrite the statute's text to accommodate DHS's administrative practice. The statutory text imposes a straightforward requirement on the government: if it wants to invoke the stop-time rule, it must serve a "notice to appear under section 1229(a)." A document that does not meet the definitional elements of the cross-referenced provision is *not* a "notice to appear under section 1229(a)." The statute's structure and history confirm this straightforward reading of the statutory text.

The BIA's interpretation is also not a reasonable one. The BIA's primary basis for rejecting the statute's plain meaning—to avoid consequences for the government's insistence on serving notice that does not meet the statute's requirements—is not a valid basis for an agency to interpret even an ambiguous statute. In cases where DHS's notice practices are *not* at issue, the BIA has adopted reasoning in significant conflict with *Camarillo*—it has held, for instance, that if the government serves a new "notice to appear," rather that completing or revising a noncompliant notice, then only the *new* "notice to appear" triggers the stop-time rule. *Matter of Ordaz*, 26 I. & N. Dec. 637 (BIA 2015). That decision not only conflicts with *Camarillo*, but means that when an immigrant's time stops impermissibly "hangs on the fortuity of an individual official's decision." *Judulang v. Holder*, 565 U.S. 42, 58 (2011).

Because the statute's text is unambiguous, and because, in any event, the BIA's interpretation is not a reasonable one, this Court should reject the BIA's interpretation of the stop-time rule and hold that only service of a "notice to appear" that satisfies § 1229(a)'s definition of that term constitutes a "notice to appear under section 1229(a)" for purposes of the stop-time rule.

STATEMENT

A. Cancellation Of Removal Is An Important Discretionary Form Of Relief Available Only To The Most Deserving Immigrants

For almost eighty years, Congress has given the Attorney General discretion to allow deserving immigrants with longstanding ties to the United States

to remain as lawful permanent residents, even if they would otherwise be inadmissible, deportable, or removable. This important form of relief originated in a 1934 proposal from the Immigration and Naturalization Service ("INS"), which believed such relief was necessary to prevent "extreme hardship" to U.S. citizens and residents with family ties to undocumented immigrants. S. Rep. No. 31-1515, at 595-96 (1950). Specifically, the INS criticized then-existing law for providing discretionary relief only for those seeking admission to the country, and not providing a way for the Attorney General to allow longtime U.S. residents to remain here. *Id.* INS officials noted that there were "a large number of cases" involving "aliens who were in the United States in an illegal status" who "had established family ties here by acquiring a spouse or children, or both." *Id.* According to INS officials, "the law was too stringent," causing "extreme hardship" to these families. *Id.* The INS therefore proposed legislation that would allow such immigrants to seek discretionary relief to remain in the country as lawful permanent residents. *Id.*

Congress followed the INS's suggestion and in due course adopted a new form of relief called suspension of deportation. *See* Alien Registration Act, 1940, ch. 439, § 20, 54 Stat. 672. In its original form, this provision gave the Attorney General power to "suspend deportation" of an otherwise-deportable immigrant if that immigrant "has proved good moral character for the preceding five years" and the Attorney General "finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien." *Id.* To ensure that only the

most deserving immigrants were eligible for suspension of deportation, Congress barred those with certain criminal convictions from eligibility for relief. 54 Stat. 672-73. Though Congress amended "suspension of deportation" over the following decades, its basic structure remained constant: those with good moral character, extended residence in the United States, and immediate family members who are U.S. citizens or lawful permanent residents could seek discretionary relief from the Attorney General to suspend deportation and adjust their status to lawful permanent resident. *See, e.g.*, 8 U.S.C. § 1254 (1952).

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, Div. C, 110 Stat. 3009-546, Congress replaced suspension of deportation with a similar form of relief called "cancellation of removal." *See* 8 U.S.C. § 1229b. Like its predecessor, cancellation of removal is available only to the most deserving immigrants with long-standing ties to the United States.

The "cancellation of removal" provision gives the Attorney General the power to cancel removal and grant a green card to eligible non-permanent residents when their removal would cause "exceptional and extremely unusual hardship" to a spouse, parent, or child who is a United States citizen or lawful permanent resident. 8 U.S.C. § 1229b(b). This discretionary relief is available only to those with "good moral character" who have not been convicted of specified criminal offenses, and who do not pose a security risk. *Id.*; *see also id.* § 1229b(c)(4). To be eligible, the applicant must have "been physically present in the United States for a continuous period of

not less than 10 years immediately preceding the" cancellation application. *Id.* § 1229b(b)(1)(A).

The Attorney General can also cancel removal for lawful permanent residents who do not present a security risk when the equities favor allowing them to remain in the country. *Id.* § 1229b(a), (c)(4); *Matter of Sotelo-Sotelo*, 23 I. & N. Dec. 201, 203 (BIA 2001). Immigrants seeking this form of relief must show that they have been lawful permanent residents for at least five years, have continuously resided in the United States for at least seven years, and have not been convicted of an aggravated felony. 8 U.S.C. § 1229b(a)(1)-(3).

Cancellation is often the only form of relief that can keep immigrant families united and allow immigrants who have made positive contributions to their communities to remain in the country. And everyone seeking cancellation must demonstrate a period of continuous presence or residence in the United States.[3] This case is about how to determine when that period stops accruing.

B. Congress Creates The Stop-Time Rule, Triggered By Service Of A "Notice To Appear," And Defines A "Notice To Appear" As Notice Of Specific Information, Including Hearing Time And Place

Congress adopted the "stop-time" rule at issue in this case to fix a specific problem that had arisen under suspension of deportation and other earlier forms

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[3] For simplicity, this brief uses the term "continuous residence" to encompass the different durational requirements for permanent residents and nonpermanent residents.

of discretionary relief. Before 1996, the period of continuous residence continued to run during the pendency of removal proceedings. *See Matter of Cisneros-Gonzalez*, 23 I. & N. Dec. 668, 670-71 (BIA 2004). Congress grew concerned that immigrants had an incentive to avoid and slow removal proceedings in order to satisfy the residence requirement. *Id.*

In response, IIRIRA enacted the stop-time rule. Under this rule, "any period of continuous residence or continuous physical presence in the United States shall be deemed to end" when one of two things happens. 8 U.S.C. § 1229b(d)(1). First, and directly relevant here, the period ends "when the alien is served a notice to appear under section 1229(a) of this title." *Id.* In other words, IIRIRA specified that the stop-time rule is triggered, and the period of continuous residence deemed to end, upon service of a specific document: "a notice to appear under section 1229(a)."

Second, the period also ends if the immigrant "commit[s]" certain offenses that would be grounds for removal or inadmissibility. 8 U.S.C. § 1229b(d)(1)(B).[4] That provision is not at issue in this case, which thus turns on when DHS served "a notice to appear under section 1229(a)."

Section 1229(a), which was also enacted in IIRIRA, provides that the document "in this section referred to as a 'notice to appear'" is "written notice . . . specifying" particular information. 8 U.S.C. § 1229(a)(1). Included in the list of information that together

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[4] The period stops on the date when the crime is committed, not the later date when the immigrant is convicted. *Matter of Perez*, 22 I. & N. Dec. 689, 693 (BIA 1999).

makes up a "notice to appear" are the key pieces of information an immigrant needs in order to "appear" at a hearing—information like the "acts or conduct alleged to be in violation of law"; the "charges against the alien and the statutory provisions alleged to have been violated"; the fact that the "alien may be represented by counsel"; the "time and place at which the proceedings will be held"; and the "consequences . . . of the failure . . . to appear at such proceedings." *Id.* These vital pieces of information are all treated identically in the statute—each is required ("shall" be included), and the statute does not give DHS, the BIA, or any other agency the authority to decide that some of this information can be left out while still serving a "notice to appear" as § 1229(a) defines that term.

IIRIRA not only enacted *both* the stop-time rule *and* the substantive "notice to appear" definition, but was also the first statute to require that the "time and place" of proceedings be included in the initial notice, rather than a subsequent hearing notice. Prior to IIRIRA, noncitizens were notified of deportation proceedings through an "order to show cause." *See* 8 U.S.C. § 1252b(a)(1) (1994). An "order to show cause" did *not* need to include the time and place of the hearing: though the statute required that such information be provided eventually, it could be provided "in the order to show cause *or otherwise*." *Id.* § 1252b(a)(2)(A) (emphasis added). Pre-1996 regulations specified that, consistent with that version of the statute, the time-and-place information would *not* be provided in the "order to show cause," but would later be sent by the immigration court. 8 C.F.R. §§ 242.1(b), 3.18 (1996).

In IIRIRA, however, Congress rejected this flexibility. Congress had grown concerned that existing notice procedures led to unnecessary disputes about whether noncitizens had received certain notices. *See* H.R. Rep. No. 104-469, pt. I, at 122, 159 (1996) (House Report); pp. 38-39, *infra*. In order to streamline notice procedures and avoid these disputes, IIRIRA abandoned the option of sending a hearing notice after the charging document: Instead of allowing the government to provide time-and-place information in the notice to appear "or otherwise," it explicitly *required* that the "time and place" of proceedings "shall" be included in the "notice to appear" itself. 8 U.S.C. § 1229(a)(1)(G)(i).

Thus, IIRIRA both triggered the stop-time rule on service of a "notice to appear under section 1229(a)," and drafted section 1229(a) to state that the document "in this section referred to as a 'notice to appear'" is "written notice . . . specifying" particular information—including, for the first time, the time and place of the hearing.[5]

C. Disregarding IIRIRA, The Government Enacts Regulations Permitting Service Of A Purported "Notice To Appear" That Does Not Include The Hearing Time Or Place

The issue in this case arises because the government has continued its pre-IIRIRA notice practices—

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[5] For immigrants who were seeking suspension of deportation under the pre-IIRIRA regime, Congress made the service of an order to show cause trigger the stop-time rule. *See Matter of Nolasco-Tofino*, 22 I. & N. Dec. 632, 633-641 (BIA 1999) (en banc).

serving notices that do not satisfy IIRIRA's stricter requirements for a "notice to appear"—and yet insists that these non-compliant notices are "notices to appear under section 1229(a)" for purposes of the stop-time rule.

There is no dispute that § 1229(a) requires that the government include in a "notice to appear" all of the specified information, requirements, and warnings—including not just the "time and place" of the hearing, but also other crucial facts like the "charges against the alien and the statutory provisions alleged to have been violated." 8 U.S.C. § 1229(a)(1). The statutory text states explicitly that a "notice to appear" "shall . . . specify[]" each piece of information. *Id.* Thus, as the court of appeals in this case recognized, "[i]t is undisputed that § 1229(a)(1) creates a duty requiring the government to provide an alien with the information listed in that provision." Pet. App. 8a.

The government, however, has decided it can simply *call* a document a "notice to appear" without satisfying IIRIRA's requirement that such a notice "shall" include the "time and place" of the hearing. 8 U.S.C. § 1229(a). Rather than maintain a system that would allow the government to serve a "notice to appear" that includes the "time and place" of the hearing—for instance, having enforcement officials contact the immigration court to schedule a hearing before serving the notice to appear, or creating a database that would allow enforcement officials to access the next available hearing time and include it in a notice to appear—the government simply promulgated a new regulation stating that providing time-and-place information in a notice to appear would be *op-*

tional. Specifically, shortly *after* IIRIRA required that a "notice to appear" "shall" specify the "time and place" of proceedings, the Attorney General adopted a regulation stating that the "notice to appear" need only provide "the time, place and date of the initial removal hearing[] *where practicable.*" 62 Fed. Reg. 10,312, 10,332 (Mar. 6, 1997) (emphasis added); *see* 8 C.F.R. § 1003.18(b) (current version following renumbering in 2003); *compare id.* § 1003.15 (items that "must" be included in a notice to appear). And while the agency responsible for preparing the notice is now DHS, *see id.* § 1001.1(c), the regulations are no more rigorous following the change.

In practice, DHS often follows the more flexible regulation, rather than the statute's strict requirement. Thus, when DHS decides it is not "practicable" to include the time-and-place information, as required by statute, it serves a notice that it *labels* a "notice to appear," but that does not "specify[]" all the information that together constitutes the document that is "referred to as a 'notice to appear'" in § 1229(a). These non-compliant notices state that the date, time, and/or place of the hearing are "to be determined." The government then files this notice with the immigration court, which the government views as the formal "commence[ment]" of removal proceedings. 8 C.F.R. §§ 1003.14(a), 1239.1(a). When the filed notice does not include the time and/or place of the initial hearing, the immigration court "schedule[s] the initial removal hearing and provid[es] notice to the government and the alien of the time, place, and date of hearing." 8 C.F.R. § 1003.18(b).

D. The Board Of Immigration Appeals Concludes That A Notice Triggers The Stop-Time Rule Even If It Does Not Satisfy The Statutory "Notice To Appear" Definition

The government's assertion that it may disregard the statute's notice requirements at will raises the question in this case: whether the government's service of notice that does not qualify as a "notice to appear" as section 1229(a) defines that term is still a "notice to appear under section 1229(a)" for purposes of the stop-time rule. *See* 8 U.S.C. § 1229b(d)(1). Following the statute's clear text, the first two courts of appeals to address this issue held that the stop-time rule ends the period of continuous residence only once an immigrant receives written notice of *all* the information listed in the statute's definition of a "notice to appear." *Guamanrrigra v. Holder*, 670 F.3d 404, 410-11 (2d Cir. 2012) ("[W]e hold that the stop-time rule is triggered upon service of a Notice to Appear that (alone or in combination with a subsequent notice) provides the notice required by § [1229](a)(1)"); *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 937 n.3 (9th Cir. 2005) (notice that "failed to specify the date or location" of hearing does not trigger stop-time rule; stop-time rule was only triggered by service of "proper hearing notice" over a year later).

The BIA, however, rejected the courts of appeals' then-unanimous interpretation of the statute in *Matter of Camarillo*. DHS served Camarillo with a document that DHS had labeled a "notice to appear," but that did not state the date or time of any hearing. 25 I. & N. Dec. at 644. DHS then did nothing for more than *two years*. Finally, after Camarillo

had maintained sufficient U.S. residence to qualify for cancellation (in her case, seven years, because she was a lawful permanent resident), DHS filed its non-compliant notice with the immigration court, and the immigration court sent Camarillo a hearing notice. *Id.* at 644-45 & n.1. Camarillo applied for cancellation of removal, and the Immigration Judge ("IJ") granted her application. *Id.* at 645. The IJ concluded that Camarillo was eligible because her period of continuous residence continued until she received written notice of all of the information required in a "notice to appear," which did not occur until she was informed of the date and time for her appearance in November 2007. *Id.*

The BIA reversed, in a published decision, concluding that Camarillo stopped accruing residence when DHS served its initial notice in August 2005, even though that document did not include a statutorily required element of a "notice to appear" (the date and time of her hearing). *Id.* The BIA held that while the IJ's reading of the statute was "plausible," an "equally plausible" reading was that the reference to a "notice to appear under section [1229](a)" is "simply definitional." *Id.* at 647. Under this "definitional" reading, the statutory phrase "merely specifies the document the DHS must serve on the alien to trigger the 'stop-time' rule," but does not impose *any* "substantive requirements" as to what must be in that document to end the period of continuous residence. *Id.*

Having found the statutory language "ambiguous," the BIA adopted its "definitional" interpretation. *Id.* The BIA concluded that the "key phrase" is "served a notice to appear," and that the words "under section

[1229](a)" merely "specify the document the DHS must serve." *Id.* The BIA also noted that the stop-time rule refers to § 1229(a), rather than the specific paragraph, § 1229(a)(1), that includes the "notice to appear" definition. *Id.* at 647-48. And the BIA understood the legislative history to support its non-substantive interpretation. *Id.* at 649-50.

The BIA emphasized the government's regulation that "expressly provides that the time, place, and date of an initial removal hearing shall be provided in the notice to appear only 'where practicable.'" *Id.* at 648 (quoting 8 C.F.R. § 1003.18(b)). When the government does not provide such information in the "notice to appear," then scheduling and providing notice of hearings falls to the immigration court under 8 C.F.R. § 1003.18(b). *Id.* at 650. According to the BIA, holding that a notice that does not qualify as a "notice to appear" under § 1229(a)'s definition nevertheless triggers the stop-time rule is necessary to allow the government to serve non-compliant notices without suffering the consequence of failing to trigger the stop-time rule until the immigration court sends its subsequent notice. *Id.*

Ultimately, the BIA concluded that its interpretation "represents, at a minimum, a reasonable choice within a gap left open by Congress," and thus decided to "adopt this approach as a matter within our adjudicative authority and administrative judgment." *Id.* at 651 (citing *Chevron*, 467 U.S. at 843-44, 866).

E. The First Circuit Defers To The BIA

1. Petitioner Wescley Pereira originally entered the United States on a tourist visa in June 2000, when he was 19 years old. Pet. App. 3a, 21a. He is

now married and has two young children, K (age 8) and M L (age 4), both of whom are U.S. citizens. *See* J.A. 23, 50, 55. Mr. Pereira and his family live on Martha's Vineyard, where Mr. Pereira works as a handyman and is the primary breadwinner for his family. J.A. 23. Mr. Pereira is a well-respected member of the Martha's Vineyard community. He has no relevant criminal history. The administrative record includes numerous letters from neighbors, friends, fellow churchgoers, and employers describing Mr. Pereira as not just a "wonderful, dedicated father and gentle husband," but a "hard worker" who is "as honest as they come," "goes out of his way to help not just his neighbors, but everyone that he can," and "contributes in a very positive way to our community." J.A. 23-32, 50-57.

2. In May 2006, DHS personally served Mr. Pereira with a document titled "notice to appear," charging him as removable for overstaying his visa. That notice, however, did not state the date or time of his initial hearing—it instructed him to appear "on a date to be set at a time to be set." J.A. 9; Pet. App. 3a. More than a year later, DHS filed the notice to appear with the immigration court, and the court tried to mail Mr. Pereira a notice setting the time of his hearing. Pet. App. 3a. However the court sent the notice to Mr. Pereira's street address rather than his post office box (where residents of Martha's Vineyard often receive mail), and the notice was returned as undeliverable. Pet. App. 3a & n.1; *see also* J.A. 36-37 (DHS's "Notice to EOIR: Alien Address" form only provides the immigration court with "street address," not mailing address), 45-46. The court held a hearing in absentia and ordered Mr. Pereira removed. Pet. App. 3a.

Mr. Pereira remained in the United States, having never received any hearing notice, and having no knowledge of the in absentia removal order.

3. In March 2013, Mr. Pereira was pulled over for not having his headlights on. He was ultimately detained by DHS. Pet. App. 3a. Because the immigration court had not mailed the 2007 hearing notice to his mailing address, the IJ reopened the removal proceedings.

Mr. Pereira applied for cancellation of removal. Pet. App. 3a-4a. By that time he had lived in the United States for well over ten years. Because he has never committed any crime that would trigger the stop-time rule, *see* 8 U.S.C. § 1229b(d)(1)(B), his eligibility depended on whether the 2006 notice stopped his period of continuous residence despite concededly not meeting all the elements of the statutory definition of a "notice to appear." *Id.* Relying on the BIA's decision in *Camarillo*, the IJ pretermitted the application, and the BIA affirmed. Pet. App. 4a, 17a-25a.

4. The First Circuit denied a petition for review. In applying *Chevron*'s first step, the court recognized that "§ 1229(a)(1) creates a duty requiring the government to provide an alien with the information listed in that provision." Pet. App. 8a. But it nevertheless found the statute ambiguous because the stop-time rule "does not explicitly state" that the government must comply with that duty "in order to cut off an alien's period of continuous physical presence" by serving a notice to appear. Pet. App. 9a. The court acknowledged that the stop-time rule explicitly referenced a notice to appear "under § 1229(a)," but concluded that this language does not

"clearly indicate" that the written notice necessary to trigger the stop-time rule must satisfy the requirements for a notice to appear under § 1229(a). *Id.* The Court made no attempt to use interpretive canons to resolve what it perceived to be textual ambiguity.

Having found the statutory language ambiguous, the court then concluded, under *Chevron*'s second step, that the BIA's interpretation was a permissible one. The court largely accepted the BIA's reasoning. *See* Pet. App. 9a-14a. Most notably, the court held that the BIA's interpretation was reasonable because it "accommodate[d] the[] practical constraints" that purportedly make it "not practical" to satisfy the statute's requirement that the time and place of the hearing be included in the "notice to appear." Pet. App. 12a.[6]

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[6] Other courts of appeals reached conflicting decisions concerning whether to defer to the BIA's decision in *Camarillo*. The Third Circuit held that the statute unambiguously requires service of a "notice to appear" that meets § 1229(a)'s definition of that term to trigger the stop-time rule. *Orozco-Velasquez v. Attorney General*, 817 F.3d 78 (3d Cir. 2016). The other courts of appeals to address this issue, including the two that had previously adopted the opposite interpretation, deferred to the BIA under *Chevron* and, when applicable, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). *Moscoso-Castellanos v. Lynch*, 803 F.3d 1079 (9th Cir. 2015); *Guaman-Yuqui v. Lynch*, 786 F.3d 235 (2d Cir. 2015); *Gonzalez-Garcia v. Holder*, 770 F.3d 431 (6th Cir. 2014); *Wang v. Holder*, 759 F.3d 670 (7th Cir. 2014); *Urbina v. Holder*, 745 F.3d 736 (4th Cir. 2014).

SUMMARY OF ARGUMENT

This Court should reverse the court of appeals. Even *Chevron*'s deferential standard of review does not permit the BIA to twist unambiguous statutory language. When DHS serves notice that does not meet the statute's definition of a "notice to appear," it fails to trigger the stop-time rule.

I. The statute's unambiguous text alone requires reversal. The stop-time rule only applies upon service of a specific document: a "notice to appear under section 1229(a)." Section 1229(a) states that the document "in this section referred to as a 'notice to appear'" is "written notice . . . specifying" particular information vital to an immigrant's ability to meaningfully "appear" at a hearing. 8 U.S.C. § 1229(a)(1). Thus, under section 1229(a), a "notice to appear" is defined as a document with specific *contents*, not just a specific title. A document that *lacks* those contents is not a "notice to appear" as § 1229(a) defines that term, and hence cannot be a "notice to appear under section 1229(a)" for purposes of the stop-time rule.

That straightforward reading of the statute's text is confirmed by its structure. Section 1229(a)'s "notice to appear" definition provides no basis for distinguishing among the pieces of information that "shall" be included in a "notice to appear." Thus, as the BIA recognized, if the government can trigger the stop-time rule without providing *all* of the required information, then the government can trigger the rule without providing *any* of that information. *Camarillo*, 25 I. & N. Dec. at 647 (BIA interprets the statute not to impose any "substantive requirements"). Notably, neither the government nor the courts of ap-

peals have been willing to accept that serving a blank piece of paper labeled "notice to appear" triggers the stop-time rule. *E.g.*, Pet. App. 8a-9a n.5; Br. in Opp. 14. But they also have not explained what would give the BIA authority to pick and choose which "notice to appear" requirements the government can ignore while still triggering the stop-time rule. The only way the stop-time rule comports with the statutory structure is if "notice to appear under section 1229(a)" means a "notice to appear" that satisfies § 1229(a)'s definition of that term. There is no basis to treat some pieces of the definition as important and others as irrelevant.

The fact that all the pertinent provisions were enacted in IIRIRA further supports reading the statutory text to mean what it says. IIRIRA did four things all at once: it created the "notice to appear"; defined that document to require inclusion of specific information, including, for the first time, the date and time of the hearing; adopted the stop-time rule; and based that rule on the newly created "notice to appear under section 1229(a)." The stop-time rule's incorporation of the substantive definition of a "notice to appear" was therefore not an accident, but a part of one coherent statutory scheme. Further, requiring the government to satisfy the statutory "notice to appear" definition to trigger the stop-time rule aligns with the expressed purpose of the stop-time rule: to prevent immigrants from delaying or avoiding proceedings in order to keep accruing qualifying residence. It is only upon service of the required information that Congress's concern kicks in, as an immigrant cannot avoid or delay proceedings before the government has scheduled them.

Finally, to the extent any doubts remain after considering the statute's text, structure, and history, the Court should apply the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)).

II. Even if some ambiguity remains, the BIA's interpretation is not reasonable. The BIA sought to interpret the statute so that DHS could continue serving notice that does not satisfy § 1229(a)'s requirements for a "notice to appear" without delaying the stop-time trigger. *Camarillo*, 25 I. & N. Dec. at 648, 650; *see also* 8 C.F.R. § 1003.18(b). Protecting DHS from the consequences of its non-compliant notice practices is not a reasonable basis to interpret the statute's text. Even at *Chevron*'s second step, the question is whether the BIA reasonably *interpreted the statute*, not reasonably accommodated the questionable practices of another administrative agency.

In *Matter of Ordaz*, the BIA revealed just how much *Camarillo* rested on the BIA's desire to avoid stop-time delays from DHS's notice practices. *Ordaz* held that if DHS serves a second "notice to appear," rather than completing or amending an original notice that DHS never filed with the immigration court, then only the *second* notice triggers the stop-time rule. 26 I. & N. Dec. 637, 639 (BIA 2015). That decision not only relies on reasoning incompatible with *Camarillo*, but leads to different results based on whether an enforcement official elects to serve a hearing notice (triggering the stop-time rule on the earlier, non-compliant notice) or a new, complete, "notice to appear" (triggering the stop-time rule on

service of the new notice). A question as important as cancellation eligibility should not "hang[] on the fortuity of an individual official's decision" as to how to label a notice. *Judulang*, 565 U.S. at 58.

ARGUMENT

I. The Statute Unambiguously Triggers The Stop-Time Rule Only Upon Service Of Notice That Satisfies The Statutory Definition Of A "Notice To Appear"

An administrative agency cannot ignore the "unambiguously expressed intent of Congress," no matter how expedient it may be to do so. *Chevron*, 467 U.S. at 842-43. Thus, if an agency's desired statutory interpretation conflicts with the statute's text, the agency is entitled to no deference—this Court follows the statute, not the agency. *Id.* Determining whether a statute is "ambiguous" for purposes of *Chevron* requires more than asking whether the statutory language could, in the abstract, be given more than one meaning. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context[.]"). This Court defers to agency interpretations only if the statute remains ambiguous after applying "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. Thus, even superficially ambiguous statutory language can unambiguously preclude the agency's interpretation when "read in context" using "normal [interpretive] tools." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568-72 (2017). If such tools resolve any ambiguity, then "there is, for *Chevron* purposes, no ambiguity . . . for [the] agency to resolve." *St. Cyr*, 533 U.S. at 320 n.45.

The statute's text resolves this case. A notice that is not a "notice to appear" under § 1229(a)'s definition of that term cannot be a "notice to appear under section 1229(a)," and hence cannot trigger the stop-time rule. That reading is confirmed by the statute's structure and history.

A. A "Notice To Appear Under Section 1229(a)" Is A Notice That Has The Elements Specified In Section 1229(a)

The statutory language is crystal clear: Whatever label DHS may place on a particular document, that document is only a "notice to appear under section 1229(a)," as used in the statutory stop-time rule, if it includes the information listed in § 1229(a)'s definition of a "notice to appear." The BIA's contrary reading—which allows a document to end an immigrant's continuous residence based purely on the caption, not the contents—directly conflicts with the clear statutory text.

1. Congress left no ambiguity concerning what the government must do to trigger the stop-time rule. Under that rule, an immigrant's "continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). This provision does not give DHS or the BIA authority to define what constitutes a notice to appear that triggers the stop-time rule. Instead, by its clear terms, the statute triggers the stop-time rule only on service of a "notice to appear *under section 1229(a)*." *Id.* (emphasis added).

Section 1229(a) states that the type of notice that is "in this section referred to as a 'notice to appear'" is "written notice . . . specifying the following." 8 U.S.C. § 1229(a)(1). It then lists the precise information that must be included for a document to be "referred to" as a "notice to appear" under that section. This includes not only the "time and place at which the proceedings will be held," but also, among other things, the "acts or conduct alleged to be in violation of the law," the "charges against the alien and the statutory provisions alleged to have been violated," the fact that the "alien may be represented by counsel," and the "consequences . . . of the failure, except under exceptional circumstances, to appear at [the] proceedings." *Id.* Written notice that does *not* "specify[]" this information is not the type of document that is "in this section referred to as a 'notice to appear.'" Section 1229(a) thus defines the term "notice to appear" as only a document that includes written notice of *all* the information required by the statute.

Taken together, these two provisions unambiguously provide that the stop-time rule only ends an immigrant's period of continuous residence when the immigrant is served with written notice of the specific information listed in § 1229(a)'s definition. Only written notice of that information constitutes a "notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1).

2. The BIA and the court of appeals incorrectly concluded that these straightforward provisions were ambiguous. The BIA reasoned that the phrase "notice to appear under section 1229(a)" could be read to "merely specif[y] the document the DHS must serve

on the alien to trigger the 'stop-time' rule," and not to "impose substantive requirements for a notice to appear to be effective in order for that trigger to occur." *Camarillo*, 25 I. & N. Dec. at 647. The court of appeals similarly reasoned that the "stop-time rule does not explicitly state that the date and time of the hearing must be included in a notice to appear in order to cut off an alien's period of continuous physical presence," and that the reference to a notice to appear "under § 1229(a)" "does not clearly indicate whether the rule incorporates the requirements of that section." Pet. App. 9a.

This reasoning is directly at odds with the statutory text. The stop-time rule does not end the period of continuous residence upon service of any form of notice, but only upon service of a "notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). And section 1229(a) states exactly what type of notice is "in this section referred to as a 'notice to appear'"—it is not just a document with a certain *title*, but a document with specific *contents*. *Id.* § 1229(a)(1). Thus, the stop-time rule *does* "impose substantive requirements" on a qualifying notice to appear, *Camarillo*, 25 I. & N. Dec. at 647, and *does* "explicitly state that the date and time of the hearing must be included in a notice to appear" to end the period of continuous residence, Pet. App. 9a. By its clear terms, the stop-time rule is only triggered by service of a particular document, and the stop-time rule cross-references the statutory provision that defines that document as one that includes specific information, including the time and place of the hearing. Congress left no interpretive gap for the BIA to fill—it made clear that the stop-time trigger is service of written notice that

includes the information specified in § 1229(a)'s definition.

3. The government takes a slightly different tack, arguing that the word "under" precludes finding the statute unambiguous. According to the government, because one possible meaning of "under" is "subject to" or "governed by," the stop-time rule could be read to end an immigrant's period of continuous residence when the government serves a notice *governed by* § 1229(a)'s definition of a "notice to appear," regardless whether the notice actually *satisfies* § 1229(a)'s definition of that term. *See* Br. in Opp. 11-12. Under this reading, whether the government triggered the stop-time rule would turn entirely on whether the government's *intent* was to serve a "notice to appear under section 1229(a)," not whether it actually did so.

Read in context, however, the statute precludes the government's interpretation just as clearly as it precludes that of the BIA and court of appeals. While the word "under" can have multiple meanings in the abstract, that does not mean the word *always* creates ambiguity. *E.g.*, *Mead Corp. v Tilley*, 490 U.S. 714, 722-23 (1989) (phrase "benefits under the plan" "can refer only to" one particular allocation of benefits). Rather, the word "draw[s] its meaning from context," *Ardestani v. INS*, 502 U.S. 129, 135 (1991), and that context can "make[] clear" what the phrase means, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 630 (2018). *See also Brown*, 513 U.S. at 118 ("Ambiguity is a creature not of definitional possibilities but of statutory context[.]"). In *this* context, the word "under" creates no ambiguity: it connects the stop-time rule's reference to a "notice to appear" to the

statutory provision that defines the term "notice to appear" as a document with particular substance, not just a particular label.

4. Other provisions in *this* statute show that when the statute refers to a "notice to appear," it means a notice that satisfies § 1229(a)'s "notice to appear" definition. For instance, in order to ensure "that an alien be permitted the opportunity to secure counsel before the first hearing date" in removal proceedings, the statute provides that "the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear[.]" 8 U.S.C. § 1229(b)(1). This provision would be largely meaningless if the government could serve a "notice to appear" for purposes of § 1229(b)(1) without including the information specified in § 1229(a)'s "notice to appear" definition. Under the government's reading, DHS could serve a self-styled "notice to appear" that did not include a hearing date, the charges against the immigrant, or the right to counsel, and then, two years later, provide all of that information on the eve of the hearing. That would hardly afford the "opportunity to secure counsel before the first hearing date" the statute guarantees. 8 U.S.C. § 1229(b)(1).

Similarly, the statute allows for an in absentia removal order for "[a]ny alien who, after written notice required under paragraph (1) or (2) of section 1229(a) . . ., does not attend a proceeding[.]" 8 U.S.C. § 1229a(b)(5). Under the government's reading of the statute, the government could seek an in absentia removal order without *ever* telling an immigrant when or where the hearing would be held. After all, the government asserts that it can serve a "notice to appear"—*i.e.* "written notice required under para-

graph (1)" of "section 1229(a)"—that does *not* specify the time or place of the hearing. According to the government's reading, an in absentia hearing could thus be scheduled and held without any actual notice to the immigrant at all. Clearly, however, Congress did not intend to authorize in absentia proceedings against immigrants who missed a hearing that the government never bothered to tell them about.

Congress triggered the stop-time rule on a "notice to appear under section 1229(a)," and section 1229(a) defines that term as notice with particular substance. Notice *without* that substance is not a "notice to appear under section 1229(a)," and does not trigger the stop-time rule. Congress left the BIA no ambiguity to resolve.

B. Traditional Tools Of Statutory Interpretation Confirm That Only Notice That Satisfies The Statute's Definition Of A "Notice To Appear" Triggers The Stop-Time Rule

Normal tools of statutory interpretation confirm that the plain reading of the statute's unambiguous text is the right one. *See Esquivel-Quintana*, 137 S. Ct. at 1569 ("normal tools of statutory interpretation" apply at *Chevron*'s first step). The statute's structure and history show that Congress used the phrase "notice to appear" to have a substantive meaning, as does the accepted rule of statutory construction that lingering ambiguities in statutes relating to deportation should be construed in favor of noncitizens.

1. The statutory structure shows that when Congress referred to a "notice to appear," it meant a document that satisfies the statutory definition of that

term, not any document DHS chooses to label as a "notice to appear."

a. The "notice to appear" definition treats all of section 1229(a)'s substantive notice requirements equally—it provides no textual basis for holding that some, but not all, of the required information can be omitted while still serving a "notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). The BIA and the government's interpretations of the stop-time rule would thus inevitably mean that a document the government labeled a "notice to appear" would trigger the stop-time rule regardless whether that document provided *any* of the information listed in § 1229(a)(1), or even any information at all. *See Orozco-Velasquez*, 817 F.3d at 84 ("Taken to its logical conclusion, the agency's approach might treat even a 'notice to appear' containing no information whatsoever as a 'stop-time' trigger[.]"). The BIA explicitly embraced this outcome, describing its reading of the statute as one that "does not impose substantive requirements for a notice to appear" to trigger the stop-time rule. *Camarillo*, 25 I. & N. Dec. at 647. The government's interpretation leads to the same result, as a document labeled a "notice to appear" would trigger the stop-time rule so long as the government intended to serve that document "pursuant to" § 1229(a), regardless whether it satisfied *any* of § 1229(a)'s substantive requirements.

This non-substantive interpretation of the stop-time rule would give DHS enormous power to stop immigrants from accruing residence while providing them little, if any, information. For instance, under the BIA and the government's reading, DHS could stop a lawful permanent resident from accruing ad-

ditional residence by serving notice that did not even state the charges that allegedly made her removable. Indeed, in theory, DHS could stop every noncitizen in the country from accruing additional residence by mailing each of them a "notice to appear" stating that the government would seek to remove them at some uncertain future date on unspecified future charges.

Such a non-substantive interpretation of a "notice to appear" makes no sense given the text Congress chose. Congress specifically triggered the stop-time rule on service of a "notice to appear *under section 1229(a)*," a section that defines that term to have a particular substantive meaning. And the substance of a "notice to appear" under § 1229(a)'s definition includes information vital to an immigrant's ability to meaningfully appear at a hearing—for instance, the "charges against the alien and the statutory provisions alleged to have been violated," and the fact that the "alien may be represented by counsel," not to mention the "time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1). Indeed, even the phrase "notice to appear" itself implies that the notice have *some* content—at the very least, "notice" of when, where, or why the immigrant is supposed to "appear." If Congress intended to trigger the stop-time rule upon service of notice that does *not* satisfy § 1229(a)'s definition of a "notice to appear," there is no reason it would have both used the statutorily-defined phrase "notice to appear" *and* explicitly cross-referenced the provision giving that phrase a substantive, not titular, meaning.

Notably, several of the courts of appeals that deferred to the BIA were unwilling to accept these im-

plications of the BIA's rule, and kept open the possibility that, if the government omitted some other, unspecified information, the written notice would not trigger the stop-time rule. *E.g.*, *Urbina*, 745 F.3d at 740 ("We do not decide today whether a more egregious case might warrant a different result."); *Guaman-Yuqui*, 786 F.3d at 241 n.3 ("We have no occasion to address in this case whether other deficiencies in a notice to appear may preclude that notice from triggering the stop-time rule."); Pet. App. 8a-9a n.5 (not deciding whether a notice "containing no information whatsoever" could trigger the stop-time rule because "this case does not require us to define the boundaries of our deference to the agency's statutory construction"). Even the government seems to recognize that a notice must provide *some* information in order to trigger the stop-time rule. *See* Br. in Opp. 14.

None of these courts provides any justification for distinguishing among the substantive requirements in § 1229(a)'s definition of a "notice to appear"—none explained, for instance, why written notice that omitted the "time and place" of the hearing should be treated any differently than written notice that omitted the "charges against the alien and the statutory provisions alleged to have been violated." 8 U.S.C. § 1229(a)(1)(D), (G)(i). The government's only attempt to distinguish among the elements of the definition is a baldly atextual appeal to statutory "purpose," whereby some elements serve the statute's purpose and some do not. Br. in Opp. 13-14; *see also Camarillo*, 25 I. & N. Dec. at 650 (reasoning that time-and-place information is not necessary to satisfy "[a] primary purpose" of a notice to appear). But if notice must meet *some* of § 1229(a)'s requirements to

trigger the stop-time rule, then it must meet *all* of those requirements, for the same textual reasons. Nothing in the statute gives the BIA (or the courts of appeals) the authority to pick and choose which requirements from the "notice to appear" definition DHS can ignore while still triggering the stop-time rule.

b. Both the BIA and the government place significant weight on the fact that the stop-time rule cross-references the subsection (§ 1229(a)) rather than the paragraph (§ 1229(a)(1)), that includes the "notice to appear" definition. *See Camarillo*, 25 I. & N. Dec. at 647-48; Br. in Opp. 14-15. That reliance is misplaced. Identifying a subsection as the location for the definition of a particular term clearly identifies that definition even where the definition happens to be contained in a specific paragraph of that subsection. While the statute certainly *could* have cross-referenced paragraph (1) in particular, its reference to subsection (a) was still perfectly clear given that the phrase "notice to appear" *is defined within subsection (a)*, and there are no *other* definitions of "notice to appear" outside of paragraph (1). Recognizing this, Congress regularly cross-references higher-level provisions than strictly necessary. *E.g.*, 18 U.S.C. § 2119(2) (cross-referencing definition in "section 1365" when definition is in § 1365(h)(3)); 42 U.S.C. § 7661(2) (cross-referencing definition in "section 7412" when definition is in § 7412(a)(1)). There is thus no reason to read anything into Congress's cross-reference to "section 1229(a)" rather than "section 1229(a)(1)." Section 1229(a) defines a "notice to appear," and that definition is limited to notices that provide specific information, including the "time and place" of the hearing.

Indeed, the structure of § 1229(a) as a whole supports interpreting the stop-time rule to require notice that meets the statute's definition of a "notice to appear." Within § 1229(a), paragraph (1) requires and defines a "notice to appear," and paragraph (2) provides procedures for notifying an immigrant of a "change in time or place of proceedings." The stop-time rule refers to a "notice to appear under section 1229(a)," and a "notice to appear" is only defined in paragraph (1). That paragraph (2) includes provisions for *changing* the time of the proceedings only emphasizes that a notice to appear as defined in paragraph (1) must include the time of the proceedings—if it did not, then there would be nothing to "change" under paragraph (2).

The BIA concluded that § 1229(a)(2) supports its counter-textual reading because it shows that "Congress envisioned that circumstances beyond the control of the DHS would require a change in the hearing date and specifically provided that such notification could occur after the issuance of the notice to appear." *Camarillo*, 25 I. & N. Dec. at 647-48. That is true, but irrelevant. The fact that the statute allows hearing times to be *changed* does not mean that it treats hearing times as meaningless. The statute allows for a "change or postponement" in an existing hearing date precisely because the statute requires that there already *be* a hearing date. And for purposes of the stop-time rule, once the government serves notice that meets the statute's definition of a "notice to appear," including the "time and place" of the hearing, 8 U.S.C. § 1229(a)(1)(G)(i), the immigrant stops accruing time; it does not matter whether the hearing date later changes under paragraph (2).

c. The fact that the stop-time rule involves only *eligibility* for *discretionary* relief, not entitlement to relief, also provides structural support for interpreting the statutory text literally. *See Moncrieffe v. Holder*, 569 U.S. 184, 204 (2013) (narrowly interpreting provision limiting eligibility for cancellation of removal in part because of discretionary nature of relief). The statute includes rigorous eligibility requirements, and even satisfying those requirements only gives the Attorney General discretion to grant relief—discretion that is itself limited by the annual cap on the number of immigrants who can receive cancellation. 8 U.S.C. § 1229b(e). The strict eligibility requirements and the discretionary nature of relief, combined with the life-changing impact cancellation has both on immigrants and their U.S. citizen or permanent resident families, supports reading the statute to mean what it says—*i.e.*, that the government must serve notice that meets section 1229(a)'s substantive requirements for a "notice to appear" to trigger the stop-time rule and potentially cut off the last chance for relief for the most deserving immigrants.

Cancellation eligibility for non-permanent residents is particularly limited. To qualify for cancellation, a non-permanent resident must not only have a "spouse, parent, or child" who is a U.S. citizen or lawful permanent resident, but also show that her deportation would cause "exceptional and extremely unusual hardship" to that family member. 8 U.S.C. § 1229b(b)(1)(D). She must prove that she has "good moral character." *Id.* § 1229b(b)(1)(B). She cannot have *any* criminal conviction that makes her inadmissible (under section 1182(a)(2)) or removable (under section 1227(a)(2))—including almost any drug

crime, *see id.* § 1227(a)(2)(B). *Id.* § 1229b(b)(1)(C). She cannot pose a security risk under §§ 1182(a)(3) and 1227(a)(4). *Id.* § 1229b(c)(4). And she cannot have committed removable immigration fraud under § 1227(a)(3). *Id.* § 1229b(b)(1)(C). Finally, she must show ten years of continuous residence prior to service of a "notice to appear under section 1229(a)." *Id.* § 1229b(b)(1)(A), (d)(1). Even meeting these stringent requirements only qualifies an applicant for *discretionary* relief—the Attorney General can still decline to grant cancellation if there is some other reason the applicant is not deserving of a green card.

The standard for cancellation eligibility is demanding even for a permanent resident. She must show not only five years of lawful permanent residence, but seven years of continuous residence. 8 U.S.C. § 1229b(a)(1). Those periods are cut off not only upon service of a "notice to appear under § 1229(a)," but also on the date she "*commit[s]*" any criminal offense that would make her inadmissible under § 1182(a)(2). *Id.* § 1229b(d)(1). She is also ineligible if she poses a security risk (under 8 U.S.C. §§ 1182(a)(3) and 1227(a)(4)), or has committed an aggravated felony—a term that itself encompasses a broad range of criminal offenses, including many drug crimes, *see* § 1101(a)(43). 8 U.S.C. §§ 1229b(a)(3), 1229b(c)(4). And like a non-permanent-resident applicant, these criteria only establish *eligibility* for discretionary relief—even a qualifying applicant still must show that the equities favor allowing her to remain in the country. *See Sotelo-Sotelo*, 23 I. & N. Dec. at 203.

Given these restrictions, the only people for whom the statutory question in this case will matter will be

the most deserving immigrants—those who would qualify for cancellation of removal but for the BIA's interpretation of the stop-time rule, and deserve a favorable exercise of discretion. Those candidates are non-permanent residents with extended residence in the United States, good moral character, little or no criminal history, and close U.S. family members who would suffer "exceptional and extremely unusual hardship" if the applicant were removed; or permanent residents with extended U.S. residence, limited criminal history, and a strong equitable case for remaining in the country. Given the numerous ways in which cancellation is limited to the most deserving applicants, combined with the devastating impact removal would have not only on cancellation applicants but also on their families, there is good reason that Congress would have set a high, substantive bar on what the government must do to trigger the stop-time rule, and cut off eligibility for relief. *See Moncrieffe*, 569 U.S. at 204.

2. The legislative history also supports interpreting the stop-time rule to end a period of continuous residence only once the government serves written notice of all of the information required by § 1229(a).

a. Both the stop-time rule and the "notice to appear" definition were enacted as part of IIRIRA. Thus, the Congress that decided to trigger the stop-time rule on a "notice to appear under § 1229(a)" knew full well that § 1229(a) defined a "notice to appear" as a notice that provided specific information, including the time and place of proceedings.

Before IIRIRA, there were multiple different notices related to initiating different types of immigration hearings. *See Judulang*, 565 U.S. at 45-46. What

were then called deportation proceedings were initiated by an "order to show cause." The statute imposed many of the same substantive requirements on an order to show cause that it now imposes on a "notice to appear." *See* 8 U.S.C. § 1252b(a)(1) (1994). Notably, however, the statute did *not* require that the "order to show cause" include the time and place of the hearing. Instead, it provided that written notice of "the time and place at which the proceedings will be held" shall be given "in the order to show cause *or otherwise*." 8 U.S.C. § 1252b(a)(2)(A) (1994) (emphasis added). The regulations provided, consistent with the statutory scheme then in effect, that notice of the time and place of the hearing would be provided by the immigration court, not in the order to show cause. *See* 8 C.F.R. § 242.1(b) (1996) ("The Order [to show cause] shall call on the respondent to appear before an Immigration Judge for a hearing at a time and place which shall be specified by the Immigration Court"); 8 C.F.R. § 3.18 (1996) ("The Immigration Court shall be responsible for providing notice of the time, place, and date of the hearing to the government and respondent/applicant."). The statute and implementing regulations also provided for an entirely separate notice to initiate what were then called "exclusion" proceedings—*i.e.*, proceedings seeking to preclude a noncitizen from entering the country. *See* 8 U.S.C. §§ 1225, 1226 (1994); 8 C.F.R. § 235.6(a) (1996).

The legislative history of IIRIRA shows that Congress sought to simplify the different notices that previously initiated different types of proceedings. Among other things, Congress was frustrated with the "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings," and

the resulting disputes about receipt of notice and inability to carry out in absentia deportation proceedings. House Report 122, 158-59.

Among Congress's responses to these concerns was to require that the "time and place" of the initial removal proceedings be included *in the notice to appear itself*, and not in a separate document. 8 U.S.C. § 1229(a)(1)(G)(i). Specifically, Congress combined deportation and exclusion proceedings into a single form of proceeding called "removal," *see Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 349-350 (2005), and created the "notice to appear" as a single form of notice to initiate such a proceeding, 8 U.S.C. § 1229(a). Congress defined a "notice to appear" as notice of particular information. *Id.* § 1229(a)(1). Much of that information was taken from the prior definition of an "order to show cause." *See* 8 U.S.C. § 1229(a)(1)(A)-(F); 8 U.S.C. § 1252b(a)(1) (1994). But Congress specifically added the "time and place at which the proceedings will be held" as information that "shall" be included for notice to qualify as a "notice to appear." 8 U.S.C. § 1229(a)(1)(G)(i). In other words, Congress abandoned the previous flexibility of allowing the government to use multiple notices in favor of the simplicity of requiring that the government serve all necessary notice in the "notice to appear."

This history shows that when Congress enacted the stop-time rule in IIRIRA, it knew that a reference to a "notice to appear under section 1229(a)" was a reference to a provision that gave a "notice to appear" a substantive meaning. And the history shows that Congress would have been *particularly* aware that a "notice to appear" must include the

time and place of the hearing, as requiring that information in a "notice to appear" was the most significant change between the earlier definition of an "order to show cause" and IIRIRA's definition of a "notice to appear."

b. The BIA and the government rely heavily on legislative history suggesting that Congress adopted the stop-time rule based on its concern that immigrants could use procedural maneuvers to extend proceedings in order to meet statutory residence requirements. *Camarillo*, 25 I. & N. Dec. at 649; Br. in Opp. 16-17. That history is entirely consistent with, and in fact supports, reading the stop-time rule to be triggered only by service of a "notice to appear" that satisfies § 1229(a)'s definition of that term—*i.e.*, notice that actually informs an immigrant of when, where, and why they are supposed to appear. Nothing in the legislative history suggests that Congress intended to end the period of continuous residence when *the government* delays removal proceedings—sometimes for years—by failing to schedule and serve notice of a hearing.

Congress's concern in adopting the stop-time rule was very specific: Because immigrants continued to accrue residence during removal proceedings, immigrants might seek to avoid, obstruct and delay those proceedings to obtain the necessary period of continuous residence and apply for relief. As the BIA explained, this loophole allowed "aliens in deportation proceedings [to] knowingly file[] meritless applications for relief or otherwise exploit[] administrative delays in the hearing and appeal processes in order to 'buy time,' during which they could acquire a period of continuous presence that would qualify them

for forms of relief that were unavailable to them when proceedings were initiated." *Cisneros-Gonzalez*, 23 I. & N. Dec. at 670; *see also* House Report 121-22 (noting that noncitizens sought to "abuse[]" the earlier laws by "seeking to delay proceedings until [the required residence period] ha[s] accrued," and "fail[ing] to appear for their deportation proceedings" and "seeking to re-open proceedings once the requisite time has passed").

An immigrant cannot duck or delay a removal proceeding, however, *when she has not been told that any hearing has been scheduled*. Until then, there is simply nothing an immigrant can do to extend her period of continuous residence (other than hope that the government continues its own delay). *Nothing* in the legislative history suggests that Congress intended to stop accrual of residence simply because the *government* did not act quickly enough in serving notice of an actual hearing—and even if the legislative history suggested such an intent, the text directly refutes it by triggering the stop-time rule on service of a form of notice that "shall . . . specify[]" the "time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i). When the government *does* serve all the notice that together constitutes a "notice to appear under section 1229(a)," then the immigrant's continuous residence is "deemed to end," removing any incentive to delay proceedings to obtain cancellation eligibility. 8 U.S.C. § 1229b(d)(1).

The concerns expressed in the legislative history thus cleanly align with the unambiguous text Congress chose. Congress sought to ensure that an immigrant could not avoid or delay removal proceed-

ings to satisfy the residence requirement. And so IIRIRA gave the government the power to stop accrual of residence by serving a "notice to appear" that, under section 1229(a)'s definition, "shall" inform the immigrant of *actual* hearings. It is only upon receiving such notice that, were it not for the stop-time rule, an immigrant might have incentives to delay proceedings. Interpreting a "notice to appear under § 1229(a)" to mean what it says—*i.e.*, notice satisfying § 1229(a)'s definition of a "notice to appear"—thus ends the period of continuous residence at the precise point at which an immigrant's incentives to avoid or delay proceedings might kick in. By contrast, interpreting a "notice to appear under section 1229(a)" to include notices that do *not* include "time and place" information—and hence do not satisfy § 1229(a)'s definition of a "notice to appear"—would not resolve the concern expressed in the legislative history, but would only penalize immigrants who cannot avoid, delay, or obstruct proceedings.[7]

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[7] In addition to legislative history concerning the purpose of the stop-time rule, the BIA relied on a "committee explanatory memorandum included in the Congressional Record," which explained that before IIRIRA an immigrant could continue to accrue time "regardless of whether . . . [the INS] had initiated deportation proceedings." *Camarillo*, 25 I. & N. Dec. at 649-50 (quoting 143 Cong. Rec. S12265, S12266 (daily ed. Nov. 9, 1997)). The BIA thought this statement showed Congress's intent to trigger the stop-time rule when the government "serves the charging document." *Id.* But the next paragraph of the memorandum, which the BIA ignored, recognized that, as the statute's text makes clear, the stop-time rule is *not* triggered by service of anything the government deems a "charging document," but only on "receipt of a 'notice to appear,' the new document the Act created to begin 'removal' proceedings." 143 Cong. Rec. S12265, S12266 (daily ed. Nov. 9, 1997).

3. This Court's "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" also weighs strongly against the BIA's interpretation. *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). That principle applies to both "punitive" provisions that establish grounds for removal and "humanitarian" provisions, like cancellation of removal, that provide relief from removal. *INS v. Errico*, 385 U.S. 214, 225 (1966). The fact that cancellation is, by its terms, a discretionary form of relief only available to a limited class of the most sympathetic and deserving immigrants makes this interpretive principle particularly applicable in this case. Thus, as in this Court's decision in *St. Cyr*, any "lingering ambiguities" that remain after considering the statute's text, structure, and history must be resolved against the government. 533 U.S. at 320 n.45 (concluding that, after applying interpretive principles to "any lingering ambiguities," there was "for *Chevron* purposes, no [remaining] ambiguity . . . for the agency to resolve").

The "accepted principle[] of statutory construction" that courts "resolve [] doubt[s]" in deportation provisions "in favor of" noncitizens stems from the nature of deportation. *Costello v. INS*, 376 U.S. 120, 128 (1964). This Court has repeatedly recognized that "deportation is a drastic measure and at times the equivalent of banishment or exile." *Id.* (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)); *see also INS v. Errico*, 385 U.S. 214, 225 (1966); *Barber v. Gonzales*, 347 U.S. 637, 642-43 (1954); *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); *see also see also Padilla v. Kentucky*, 559 U.S. 356, 373-74 (2010) (recognizing "the seriousness of deportation" and the

"concomitant impact of deportation on families living lawfully in this country"). Thus, even where the government's proposed interpretation "might find support in logic," this Court "will not assume that Congress meant to trench on [noncitizens'] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan*, 333 U.S. at 10.

The principle of construing statutes in favor of noncitizens is particularly applicable in interpreting a provision, like cancellation of removal, that is not "punitive" but "was designed to accomplish a humanitarian result." *Errico*, 385 U.S. at 225. Thus, in *Errico*, this Court applied the principle to resolve ambiguities in a provision with the "humanitarian purpose of preventing the breaking up of families composed in part at least of American citizens." *Id.* And the Court similarly applied the principle in *St. Cyr*, which concerned a form of relief from inadmissibility for certain lawful permanent residents. 533 U.S. at 320.

The purposes behind this principle are particularly applicable to determining eligibility for cancellation of removal, which not only "prevents[s] the breaking up of families," *Errico*, 385 U.S. at 225, but is available only to those who meet numerous stringent requirements. *See* pp. 35-38, *supra*. Even then, the Attorney General can still deny cancellation if he concludes that the immigrant should not remain in the country. *See* pp. 36-37, *supra*. Construing lingering doubts in favor of immigrants is particularly important in determining eligibility for such a limited, discretionary, and vitally important form of relief. *See Errico*, 385 U.S. at 225; *St. Cyr*, 533 U.S. at

320; *cf. Moncrieffe*, 569 U.S. at 204 (relying on discretionary nature of relief as basis to narrowly construe provision limiting eligibility for cancellation); *Dean v. United States*, 556 U.S. 568, 585-85 (2009) (Breyer, J., dissenting) (explaining that lenity is particularly important when interpreting provisions, like mandatory minimum sentences, that remove adjudicatory discretion).

This Court can apply this "accepted principle[] of statutory construction," *Costello*, 376 U.S. at 128, without reaching the "reasonableness" of the BIA's interpretation under *Chevron*'s second step. This Court applies "normal tools of statutory interpretation" before deeming a statute "ambiguous" for *Chevron* purposes. *E.g.*, *Esquivel-Quintana*, 137 S. Ct. at 1569, 1572 (applying "normal tools of statutory interpretation" to conclude that a statute, "read in context, unambiguously forecloses the Board's interpretation" without reaching *Chevron*'s second step). The principle that ambiguous deportation provisions should be read to have the "narrowest of several possible meanings," *Fong Haw Tan*, 333 U.S. at 10, is precisely such an interpretive tool.

This Court recognized this precise point in *St. Cyr*. That case involved the question whether IIRIRA's repeal of a form of relief formerly available in section 212(c) of the INA applied retroactively. 533 U.S. at 314-15. This Court held that IIRIRA was "ambiguous" as to whether its repeal applied retroactively. *Id.* at 315. The government argued that because the statute was ambiguous, the Court should defer to the BIA, which had held that IIRIRA *is* retroactive. This Court disagreed, concluding that deference only applies "to agency interpretations of statutes that, *ap-*

plying the normal 'tools of statutory construction,' are ambiguous." *Id.* at 320 n.45 (emphasis added) (quoting *Chevron*, 467 U.S. at 843). The Court identified two relevant tools of statutory construction: "[t]he presumption against retroactive application of ambiguous statutory provisions, buttressed by the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Id.* at 320 (internal quotation marks omitted). Applying these principles, the Court concluded that "there is, for *Chevron* purposes, no ambiguity in such a statute for [the] agency to resolve." *Id.* at 320 n.45.[8]

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[8] This does not mean, of course, that any time an immigration provision relating to deportation contains any ambiguity, the immigrant must win. Traditional interpretive canons may show that, despite facial ambiguity, Congress intended the less-immigrant-friendly interpretation. *See, e.g.*, *Kawashima v. Holder*, 565 U.S. 478, 489 (2012) (recognizing that "we have, in the past, construed ambiguities in deportation statutes in the alien's favor," but concluding that "the application of the present statute [is] clear enough that resort to the rule of lenity is not warranted"). And this Court has also suggested that "ordinary canons of statutory construction" might apply differently, for *Chevron* purposes, when the BIA is giving content to a general standard—like "well-founded fear"—rather than engaging in a form of statutory construction that is "narrower[and] well within the province of the judiciary"—like whether Congress intended two standards to be identical. *Cardoza-Fonseca*, 480 U.S. at 447-49. Like the question in *Cardoza-Fonseca*, the question in this case is a "narrow[]" question of statutory interpretation that is "well within the province of the judiciary." *Id.* Thus, the Court must apply "ordinary canons of statutory construction"—including the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien"—before reaching *Chevron*'s second step. *Id.* at 449.

As in *St. Cyr*, the statute's text, confirmed by its structure, its history, and traditional interpretive canons, unambiguously resolves this case. The stop-time rule is triggered only by service of a "notice to appear under section 1229(a)," and a document that lacks the time and place of the hearing is not a "notice to appear" as § 1229(a) defines that term. The statute's structure and history confirm the plain meaning of the text. And to the extent any lingering doubts remain, they should, consistent with this Court's longstanding interpretive principles, be construed in the immigrant's favor. As in *St. Cyr*, "there is, for *Chevron* purposes, no ambiguity [left] for [the] agency to resolve." *St. Cyr*, 533 U.S. at 320 n.45.

II. The BIA's Interpretation Is Unreasonable And Not Entitled To Deference

Even if some ambiguity remains after reading the statute using normal interpretive tools, the BIA's interpretation is not a reasonable one. It not only rests on a misunderstanding of the statute's text, structure, and history, *see* pp. 24-48, *supra*, but it is also based on an impermissible desire to accommodate the government's unwillingness to serve notices that meet the statute's definition of a "notice to appear." The BIA effectively recognized the problems with *Camarillo* in its subsequent decision in *Ordaz*, which not only relies on reasoning incompatible with *Camarillo* but also, when combined with *Camarillo*, makes the stop-time trigger turn on the whims of individual DHS officials.

1. To the extent the BIA concluded that its non-substantive interpretation of the stop-time rule was reasonable based on the statute's text, structure, and

history, the BIA's analysis was deeply flawed. *See Camarillo*, 25 I. & N. Dec. at 647-650. In reality, the statute's text, supported by its structure and history, weighs strongly—indeed, as already explained, dispositively, pp. 24-48, *supra*—*against* the BIA's construction of the statute.

At the very least, the text, structure and history weigh strongly against the "reasonableness" of the BIA's interpretation. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442-43 (2014) ("reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole" (internal quotation marks and citations omitted)). This is especially true given the "accepted principle[] of statutory construction" that any "doubts" concerning the proper interpretation of the stop-time rule should be "resolve[d]" in favor of immigrants. *Costello*, 376 U.S. at 128. If, under *Chevron*, courts can adopt an agency's statutory interpretation even if it is not the best interpretation of the statute, courts should at least place a heavy burden on agencies to justify interpreting a statute in a way the reviewing court would not independently accept.

2. The BIA's justification for its non-substantive interpretation of the statute—to allow the government to follow its own flexible regulation, rather than the more demanding statutory text, without delaying the stop-time trigger—is not a reasonable one.

In the stop-time rule, IIRIRA gave the government significant power to end an immigrant's period of continuous residence, but required that the government provide more information than was previously required in order to exercise that power. As ex-

plained above, pp. 11, 38-40, *supra*, the predecessor of the "notice to appear," called an "order to show cause," did *not* need to include the date and time of the hearing. IIRIRA rejected this endorsement of a dual-notice system: as one of many steps Congress took to simplify the notice process, IIRIRA required that the "time and place at which the proceedings will be held" "shall" be "specif[ied]" in the "notice to appear" itself. 8 U.S.C. § 1229(a)(1)(G)(i); *see also* Pet. App. 8a. IIRIRA then cross-referenced this new, stricter, "notice to appear" definition in the stop-time rule. 8 U.S.C. § 1229b(d)(1).

Apparently, however, the government did not like IIRIRA's requirement that the hearing information "shall" be included in the "notice to appear," preferring the pre-IIRIRA regime in which providing such information in the "order to show cause" was optional. The government therefore, shortly after IIRIRA, adopted a regulation repudiating IIRIRA's command that the "time and place" of the hearing "shall" be provided in the "notice to appear," and restating the old system in which such information need only be included in the "notice to appear" "where practicable." 8 C.F.R. § 1003.18(b).

The BIA concluded that notice triggers the stop-time rule even without satisfying § 1229(a)'s definition of a "notice to appear" largely to allow the government to shirk its responsibility under IIRIRA to provide hearing information in the "notice to appear," while still triggering the stop-time rule. The BIA relied on the regulations making it optional whether to include hearing information in the notice to appear, and largely ignored the *statute's* requirement that the "notice to appear" "shall . . . specify[]"

such information. *Camarillo*, 25 I. & N. Dec. at 648, 650. And it noted that under the government's regulation, the obligation to actually provide hearing notice falls on the immigration court. *Id.* The BIA then expressed concern that "scheduling delays in Immigration Court" could impact when hearing notice was served, which would delay the stop-time trigger if providing such information was necessary to trigger the stop-time rule. *Id.* at 650. According to the BIA, Congress would not have expected that such scheduling delays in immigration court could delay triggering the stop-time rule. *Id.* at 650.

What Congress would have expected, however, is that the government would follow the statute. After all, if the "notice to appear" included the "time and place" of the hearing, as the statute indisputably requires, then the immigrant would stop accruing residence upon service of that document and any "delays" in immigration court would be irrelevant. But instead of, for instance, having enforcement agents call the immigration court to schedule a hearing before serving the "notice to appear" or maintaining a system that allows agents to access the next available hearing date—as IIRIRA clearly envisioned—the government has stuck to the pre-IIRIRA system of serving non-compliant notices, filing them with the immigration court (sometimes years after service, as in both *Camarillo* and this case), and then waiting for the immigration court to schedule a hearing. The statute itself makes clear what impact this practice has on the stop-time rule: that rule is triggered by a "notice to appear under section 1229(a)," and section 1229(a) states that notice is not a "notice to appear" unless it includes the "time and place" of the hearing. The BIA cannot reasonably contort this plain lan-

guage to avoid any adverse stop-time consequences from the government's refusal to follow IIRIRA's notice requirements.

3. The unreasonableness of the BIA's decision is highlighted by the BIA's subsequent decision in *Matter of Ordaz*. The question in *Ordaz* was whether service of a "notice to appear" triggers the stop-time rule if the government never files the notice with the immigration court, and then serves a new "notice to appear" later, after the immigrant has satisfied the permanent residence requirement. 26 I. & N. Dec. at 638. The BIA held that service of the first "notice to appear" does *not* trigger the stop-time rule. *Id.* at 639.

Ordaz's reasoning is flatly inconsistent with *Camarillo*. In *Ordaz*, the BIA explained that if the first notice *did* trigger the stop-time rule, that "would potentially render an alien ineligible for relief on the basis of a charging document that was invalid or otherwise insufficient to support a removal charge as issued." *Id.* at 640. Congress, according to the BIA, could not have intended "such far-reaching consequences." *Id.* at 640. But *Camarillo*'s consequences are even more extreme: *Camarillo* not only "*potentially* render[s] an alien ineligible for relief" based on an "invalid" or "insufficient" charging document, it *automatically* has that result. After all, there is no dispute that a notice that lacks the "time and place at which the proceedings will be held"—or any of the other information required in a "notice to appear" under § 1229(a)'s definition—is not, on its own, a valid or sufficient "notice to appear." And yet *Camarillo* held that such invalid and insufficient notice *does* trigger the stop-time rule.

Ordaz's discussion of *Camarillo* shows that *Camarillo* is simply an attempt to let DHS escape the stop-time consequences of refusing to follow IIRIRA's command that a "notice to appear" must include the "time and place" of the hearing. The BIA effectively admitted that the primary distinction between *Camarillo* and *Ordaz* is that *Camarillo* involved a systematic practice the BIA felt that it needed to protect, whereas *Ordaz* did not. *Ordaz* distinguished *Camarillo* largely because "the time and location where the proceedings will take place" is "often provided after service of a notice to appear."[9] *Ordaz*, 26 I. & N. Dec. at 642. No such concerns were implicated by *Ordaz*, because DHS does not "often" serve multiple notices to appear. Twisting the statute was therefore not necessary in *Ordaz* because there was no non-compliant regulatory regime that needed to be protected from stop-time consequences.

The combination of *Ordaz* and *Camarillo* makes the stop-time trigger turn on arbitrary conduct of individual enforcement officials. For instance, imagine an immigrant who is served with a notice labeled "notice to appear" that states that the charges against him and the date and time of his hearing are "to be determined." Years go by, the government does not file the notice with the immigration court, and the immigrant becomes eligible for cancellation

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[9] Remarkably, *Ordaz* stated that this delayed notice is "contemplated by both the Act and the regulations." *Id.* at 642. The BIA did not cite any provision of "the Act" that "contemplated" that notice of the "time and place" of hearings would take place outside the "notice to appear." After all, "the Act" states that the "notice to appear" "shall . . . specify[] . . . the time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i).

of removal. The immigrant then, like Mr. Pereira, is pulled over for not turning on his headlights and comes to the attention of a DHS official. The official could do one of two things. He could serve a hearing notice and notice of additional charges (*see* 8 C.F.R. § 1240.10(e)), in which case the prior notice would, under *Camarillo*, trigger the stop-time rule. Or he could serve a new "notice to appear" that includes the hearing date and charges, in which case only that *later* notice would trigger the stop-time rule under *Ordaz*.

In any rational system, these two scenarios would be treated the same for stop-time purposes. After all, the immigrant would receive exactly the same notice at exactly the same time under either scenario—all that differs is the title of the piece of paper on which the notice is provided. But under the BIA's approach, the title of the piece of paper is life-changing. If the immigrant receives a hearing notice and notice of additional charges, the immigrant is forever barred from applying for cancellation of removal, separated from his family, and removed from the country he has called home for more than a decade. If, however, the DHS official serves a new "notice to appear," providing exactly the same information, then the immigrant is free to apply for cancellation of removal and potentially obtain lawful permanent residence. For the reasons already explained, the statute's text precludes this absurdity by requiring notice of *all* the information listed in the definition of a "notice to appear under section 1229(a)" to trigger the stop-time rule. But even if that provision is, somehow, ambiguous, the BIA cannot reasonably interpret the statute such that "everything hangs on

the fortuity of an individual official's decision." *Judulang*, 565 U.S. at 58.

* * *

The problems with the BIA's interpretation of the stop-time rule are so extreme that its decision falls far outside the deference owed to the agency under *Chevron*. Indeed, if deference *were* somehow owed to the BIA's decision in this case, it would raise significant constitutional questions.[10] The Court need not reach those questions, however, because the statute, read correctly, does not contain any ambiguity for the agency to resolve. And if it did, even *Chevron*'s deferential standard of review does not permit the BIA to use its interpretive authority to protect the executive branch from the consequences of serving notice that does not satisfy the statutory requirements for a "notice to appear."

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[10] *See Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). To the extent the Court concludes that it is necessary to reach these constitutional issues to resolve this case, it should request supplemental briefing and argument. *Cf. Johnson v. United States*, 135 S. Ct. 939 (2015); *see* Pet. 22 n.4; Cert. Reply Br. 12.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DAVID J. ZIMMER
ALEXANDRA LU
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210

JEFFREY B. RUBIN
TODD C. POMERLEAU
RUBIN POMERLEAU PC
3 Center Plaza, Ste. 400
Boston, MA 02108

WILLIAM M. JAY
Counsel of Record
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinlaw.com
(202) 346-4000

Counsel for Petitioner

APPENDIX

APPENDIX

1. The current version of 8 U.S.C. § 1229 provides:

§ 1229. Initiation of removal proceedings

(a) Notice to appear

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F) (i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G) (i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable,

through service by mail to the alien or to the alien's counsel of record, if any) specifying—

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

(3) Central address files

The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

(b) Securing of counsel

(1) In general

In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

(2) Current lists of counsel

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1229a of this title. Such lists shall be provided under subsection (a)(1)(E) and otherwise made generally available.

(3) Rule of construction

Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

(c) Service by mail

Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F).

(d) Prompt initiation of removal

(1) In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction.

(2) Nothing in this subsection shall be construed to create any substantive or procedural right or benefit

that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(e) Certification of compliance with restrictions on disclosure

(1) In general

In cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 1367 of this title have been complied with.

(2) Locations

The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization.

(B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in

subparagraph (T) or (U) of section 1101 (a)(15) of this title.

2. The current version of 8 U.S.C. § 1229b provides:

§ 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than

10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) Special rule for battered spouse or child

(A) Authority

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that—

(i) (I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who

is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent); or

(III) the alien has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the alien intended to marry, but whose marriage is not legitimate because of that United States citizen's or lawful permanent resident's bigamy;

(ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application, and the issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States;

(iii) the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C);

(iv) the alien is not inadmissible under paragraph (2) or (3) of section 1182(a) of this title, is not deportable under paragraphs (1)(G) or (2) through (4) of section 1227(a) of this title, subject to paragraph (5), and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

(B) Physical presence

Notwithstanding subsection (d)(2), for purposes of subparagraph (A)(ii) or for purposes of section 1254(a)(3) of this title (as in effect before the title 111-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the alien demonstrates a connection between the absence and the battering or extreme cruelty perpetrated against the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2). If any absence or aggregate absences exceed 180 days, the absences or portions of the absences will not be considered to break the period of continuous presence. Any such period of time excluded from the 180-day limit shall be excluded in computing the time during which the alien has been physically present for purposes of the 3-year requirement set forth in this subparagraph, subparagraph (A)(ii), and section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(C) Good moral character

Notwithstanding section 1101(f) of this title, an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of subparagraph (A)(iv) shall not bar the Attorney General from finding the alien to be of good moral character under subparagraph (A)(iii) or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.

(D) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

(3) Recordation of date

With respect to aliens who the Attorney General adjusts to the status of an alien lawfully admitted for permanent residence under paragraph (1) or (2), the Attorney General shall record the alien's

lawful admission for permanent residence as of the date of the Attorney General's cancellation of removal under paragraph (1) or (2).

(4) Children of battered aliens and parents of battered alien children

(A) In general

The Attorney General shall grant parole under section 1182(d)(5) of this title to any alien who is a—

(i) child of an alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); or

(ii) parent of a child alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(B) Duration of parole

The grant of parole shall extend from the time of the grant of relief under subsection (b)(2) or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to the time the application for

adjustment of status filed by aliens covered under this paragraph has been finally adjudicated. Applications for adjustment of status filed by aliens covered under this paragraph shall be treated as if the applicants were VAWA self-petitioners. Failure by the alien granted relief under subsection (b)(2) or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) may result in revocation of parole.

(5) Application of domestic violence waiver authority

The authority provided under section 1227(a)(7) of this title may apply under paragraphs (1)(B), (1)(C), and (2)(A) (iv) in a cancellation of removal and adjustment of status proceeding.

(6) Relatives of trafficking victims

(A) In general

Upon written request by a law enforcement official, the Secretary of Homeland Security may parole under section 1182(d)(5) of this title any alien who is a relative of an alien granted continued presence under section 7105(c)(3)(A) of title 22, if the relative—

(i) was, on the date on which law enforcement applied for such continued presence—

(I) in the case of an alien granted continued presence who is under 21 years of age, the spouse, child, parent, or unmarried sibling under 18 years of age, of the alien; or

(II) in the case of an alien granted continued presence who is 21 years of age or older, the spouse or child of the alien; or

(ii) is a parent or sibling of the alien who the requesting law enforcement official, in consultation with the Secretary of Homeland Security, as appropriate, determines to be in present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement, irrespective of age.

(B) Duration of parole

(i) In general

The Secretary may extend the parole granted under subparagraph (A) until the final adjudication of the application filed by the principal alien under section 1101(a)(15)(T)(ii) of this title.

(ii) Other limits on duration

If an application described in clause (i) is not filed, the parole granted under

subparagraph (A) may extend until the later of—

(I) the date on which the principal alien's authority to remain in the United States under section 7105(c)(3) (A) of title 22 is terminated; or

(II) the date on which a civil action filed by the principal alien under section 1595 of title 18 is concluded.

(iii) Due diligence

Failure by the principal alien to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) of subparagraph (A), or in pursuing the civil action described in clause (ii)(II) (as determined by the Secretary of Homeland Security in consultation with the Attorney General), may result in revocation of parole.

(C) Other limitations

A relative may not be granted parole under this paragraph if—

(i) the Secretary of Homeland Security or the Attorney General has reason to believe that the relative was knowingly complicit in the trafficking of an alien permitted to remain in the United States under section 7105(c)(3)(A) of title 22; or

(ii) the relative is an alien described in paragraph (2) or (3) of section 1182(a) of this title or paragraph (2) or (4) of section 1227(a) of this title.

(c) Aliens ineligible for relief

The provisions of subsections (a) and (b)(1) shall not apply to any of the following aliens:

(1) An alien who entered the United States as a crewman subsequent to June 30, 1964.

(2) An alien who was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title, or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 1182(e) of this title.

(3) An alien who—

(A) was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101 (a)(15)(J) of this title or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training,

(B) is subject to the two-year foreign residence requirement of section 1182(e) of this title, and

(C) has not fulfilled that requirement or received a waiver thereof.

(4) An alien who is inadmissible under section 1182(a)(3) of this title or deportable under section 1227(a)(4) of this title.

(5) An alien who is described in section 1231(b)(3)(B)(i) of this title.

(6) An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 1254(a) of this title or who has been granted relief under section 1182(c) of this title, as such sections were in effect before September 30, 1996.

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

(2) Treatment of certain breaks in presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(3) Continuity not required because of honorable service in Armed Forces and presence upon entry into service

The requirements of continuous residence or continuous physical presence in the United States under subsections (a) and (b) shall not apply to an alien who—

(A) has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and

(B) at the time of the alien's enlistment or induction was in the United States.

(e) Annual limitation

(1) Aggregate limitation

Subject to paragraphs (2) and (3), the Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 1254(a) of this title (as in effect before

September 30, 1996), of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such cancellation and adjustment, or such suspension and adjustment, and whether such an alien had previously applied for suspension of deportation under such section 1254(a) of this title. The numerical limitation under this paragraph shall apply to the aggregate number of decisions in any fiscal year to cancel the removal (and adjust the status) of an alien, or suspend the deportation (and adjust the status) of an alien, under this section or such section 1254(a) of this title.

(2) Fiscal year 1997

For fiscal year 1997, paragraph (1) shall only apply to decisions to cancel the removal of an alien, or suspend the deportation of an alien, made after April 1, 1997. Notwithstanding any other provision of law, the Attorney General may cancel the removal or suspend the deportation, in addition to the normal allotment for fiscal year 1998, of a number of aliens equal to 4,000 less the number of such cancellations of removal and suspensions of deportation granted in fiscal year 1997 after April 1, 1997.

(3) Exception for certain aliens

Paragraph (1) shall not apply to the following:

(A) Aliens described in section 309(c)(5)(C)(i) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (as amended by the

Nicaraguan Adjustment and Central American Relief Act).

(B) Aliens in deportation proceedings prior to April 1, 1997, who applied for suspension of deportation under section 1254(a)(3) of this title (as in effect before September 30, 1996).

3. The current version of 8 C.F.R. § 1003.18 provides:

§ 1003.18 Scheduling of cases.

(a) The Immigration Court shall be responsible for scheduling cases and providing notice to the government and the alien of the time, place, and date of hearings.

(b) In removal proceedings pursuant to section 240 of the Act, the Service shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, where practicable. If that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing. In the case of any change or postponement in the time and place of such proceeding, the Immigration Court shall provide written notice to the alien specifying the new time and place of the proceeding and the consequences under section 240(b)(5) of the Act of failing, except under exceptional circumstances as defined in section 240(e)(1) of the Act, to attend such proceeding. No such notice shall be required for an alien not in detention if the alien has failed to provide the address required in section 239(a)(1)(F) of the Act.

4. The 1994 version of 8 U.S.C. § 1252b provided in pertinent part:

§ 1252b. Deportation procedures

(a) Notices

(1) Order to show cause

In deportation proceedings under section 1252 of this title, written notice (in this section referred to as an "order to show cause") shall be given in person to the alien (or, if personal service is not practicable, such notice shall be given by certified mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided a list of counsel prepared under subsection (b)(2) of this section.

(F) (i) The requirement that the alien must immediately provide (or have provided) the

Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1252 of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under subsection (c)(2) of this section of failure to provide address and telephone information pursuant to this subparagraph.

(2) Notice of time and place of proceedings

In deportation proceedings under section 1252 of this title—

(A) written notice shall be given in person to the alien (or, if personal service is not practicable, written notice shall be given by certified mail to the alien or to the alien's counsel of record, if any), in the order to show cause or otherwise, of –

(i) the time and place at which the proceedings will be held, and

(ii) the consequences under subsection (c) of this section of the failure, except under exceptional circumstances, to appear at such proceedings; and

(B) in the case of any change or postponement in the time and place of such proceedings, written

notice shall be given in person to the alien (or, if personal service is not practicable, written notice shall be given by certified mail to the alien or to the alien's counsel of record, if any) of—

(i) the new time or place of the proceedings, and

(ii) the consequences under subsection (c) of this section of failing, except under exceptional circumstances, to attend such proceedings.

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under subsection(a)(1)(F) of this section.

* * * *

No. 17-459

In the Supreme Court of the United States

WESCLEY FONSECA PEREIRA, PETITIONER

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JONATHAN C. BOND
Assistant to the Solicitor General
DONALD E. KEENER
JOHN W. BLAKELEY
PATRICK J. GLEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

To be eligible for cancellation of removal under the Immigration and Nationality Act (INA), 8 U.S.C. 1101, *et seq.*, an alien who has not been admitted for permanent residence must establish, among other things, that he "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [his cancellation] application." 8 U.S.C. 1229b(b)(1)(A). Under the INA's stop-time rule, an applicant's period of continuous physical presence is "deemed to end * * * when the alien is served a notice to appear under section 1229(a)" of the INA, notifying him that removal proceedings are being initiated against him. 8 U.S.C. 1229b(d)(1). The question presented is:

Whether a notice to appear issued under 8 U.S.C. 1229(a) must include a date and time certain for the alien's initial removal hearing to stop an alien's period of continuous physical presence for purposes of 8 U.S.C. 1229b(b)(1)(A).

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 866 F.3d 1. The opinions of the Board of Immigration Appeals (Pet. App. 17a-19a) and the immigration judge (Pet. App. 20a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2017. The petition for a writ of certiorari was filed on September 27, 2017. The petition was granted on January 12, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-94a.

STATEMENT

In May 2006, after having remained in the United States for nearly six years on a six-month nonimmigrant visa, petitioner was arrested for operating a vehicle while under the influence. While petitioner was detained, he was personally served with a notice to appear in removal proceedings under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, which stated that the date and time of his removal hearing were "to be set." J.A. 9 (Administrative Record (A.R.) 217) (emphasis omitted). In the ensuing proceedings, petitioner conceded he was removable but sought cancellation of removal, a form of discretionary relief that a nonpermanent-resident alien may seek only if (*inter alia*) he has maintained continuous physical presence in the United States for at least ten years. 8 U.S.C. 1229b(b)(1)(A). An immigration judge (IJ) found petitioner ineligible for cancellation of removal under the INA's stop-time rule—which provides that an alien's period of continuous physical presence ends "when the alien is served a notice to appear under section 1229(a) of [Title 8]," 8 U.S.C. 1229b(d)(1)—because petitioner had been personally served with a notice to appear within ten years of entering the country in 2000. The Board of Immigration Appeals (Board) affirmed. Pet. App. 17a-19a (A.R. 2-3). The court of appeals denied petitioner's petition for review. *Id.* at 1a-16a.

1. a. Under the INA, an alien who is admitted to the United States temporarily as a nonimmigrant—such as for tourism, 8 U.S.C. 1101(a)(15)(B)—but who remains longer than permitted is removable. See 8 U.S.C. 1227(a)(1)(B) and (C)(i). To effectuate such a removal,

the Department of Homeland Security (DHS) commences removal proceedings against the alien before an IJ. See 8 U.S.C. 1229a.[1]

To apprise the alien of the government's initiation of removal proceedings, the INA provides that "written notice (in this section referred to as a 'notice to appear') shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any)." 8 U.S.C. 1229(a)(1). A notice to appear must specify, among other things: (A) the "nature of the proceedings against the alien"; (B) the "legal authority under which the proceedings are conducted"; (C) the "acts or conduct alleged to be in violation of law"; (D) the "charges against the alien" and their statutory basis; (E) that the "alien may be represented by counsel" and "will be provided * * * a period of time to secure counsel"[2]; (F) that "the alien must immediately provide * * * a written record of an address * * * at which the alien may be contacted," and "of any change of the alien's address," to the "Attorney General," and the consequences of failing to do so; and (G) the "time and place at which the proceedings will be held," and the consequences for failure to appear. *Ibid.* Much of the required information that is not specific to

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[1] Some functions relating to immigration that were formerly vested in the Attorney General have been transferred to officials of DHS. Accordingly, some residual statutory references to the Attorney General that pertain to the transferred functions are now deemed to refer to the Secretary of Homeland Security, either exclusively or in addition to the Attorney General. See 6 U.S.C. 251 (2012 & Supp. IV 2016), 6 U.S.C. 271(b), 542 note, 557; 8 U.S.C. 1551 note.

[2] The alien also must be given a list, maintained by the Attorney General and updated quarterly, of counsel who are available to represent aliens pro bono. 8 U.S.C. 1229(a)(1)(E) and (b)(2).

a particular alien is incorporated into DHS's standardized notice-to-appear form (Form I-862). See J.A. 7-13 (A.R. 217-218).

To ensure that the alien is "permitted the opportunity to secure counsel before the first hearing date," the INA provides that "the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear" unless the alien requests an earlier date. 8 U.S.C. 1229(b)(1). It does not otherwise constrain the timing of the initial hearing. And it expressly contemplates that the date and time (or place) of the hearing may be changed upon "written notice" to the alien of "the new time or place." 8 U.S.C. 1229(a)(2)(A). Such notice of a change is unnecessary, however, if "the alien has failed to provide [his] address" as required. 8 U.S.C. 1229(a)(2)(B); see 8 U.S.C. 1229(a)(3) (requiring Attorney General to "create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes)" aliens "provide[]").

If an alien who has been served with the "written notice required under paragraph (1) or (2) of section 1229(a)" fails to appear, the alien "shall be ordered removed in absentia." 8 U.S.C. 1229a(b)(5)(A). An alien may not be removed in absentia, however, unless DHS "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." *Ibid.* An order of removal entered in absentia may be rescinded in certain limited circumstances, including (*inter alia*) "if the alien demonstrates that [he] did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." 8 U.S.C. 1229a(b)(5)(C)(ii). In addition, if an in absentia removal order has been entered and the alien was orally notified "at the time of the notice described in paragraph (1) or

(2) of section 1229(a) * * * of the time and place of the proceedings and of the consequences * * * of failing" to appear, then (absent "exceptional circumstances") he is ineligible for certain discretionary relief for ten years. 8 U.S.C. 1229a(b)(7).

b. i. The INA has long granted the Attorney General discretion to grant relief from removal in certain circumstances. As relevant here, prior to 1996, it provided that "the Attorney General m[ight], in his discretion, suspend deportation" of an alien if (1) the alien showed he "ha[d] been physically present in the United States for a continuous period of not less than seven years" before seeking suspension of deportation; (2) he "prove[d] that during all of such period he was and [remained] a person of good moral character"; and (3) he "[was] a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1254(a)(1) (1994); see *INS* v. *Chadha*, 462 U.S. 919, 923-924 (1983).[3] This Court described suspension of deportation as "'an act of grace'" that "cannot be demanded as a right" and instead lay within the "unfettered discretion of the Attorney General," akin to "'a judge's power to suspend the execution of a sentence, or the President's to pardon a convict.'" *Jay* v. *Boyd*, 351 U.S. 345, 354 & n.16 (1956) (citations omitted).

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[3] Special rules applied to aliens who were deportable based on criminal-offense, document-fraud, or security grounds or who had "been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident." 8 U.S.C. 1254(a)(2) and (3) (1994).

Congress became concerned, however, that suspension of deportation and other forms of discretionary relief were being exploited inappropriately and impeding the expeditious removal of aliens unlawfully present—including aliens who had committed crimes or had entered lawfully but stayed longer than authorized. H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 114-115, 118-125 (1996) (House Report). For example, "[t]he 'extreme hardship' standard" for suspension of deportation "ha[d] been weakened by recent administrative decisions" that deemed routine consequences of removal sufficient. H.R. Rep. No. 828, 104th Cong., 2d Sess. 213 (1996) (Conf. Report).

Members of Congress also were concerned that aliens were "abus[ing]" suspension of deportation by exploiting delays in deportation proceedings to evade the continuous-physical-presence requirement. House Report 122. Before 1996, the statute did not contain a mechanism to terminate an alien's period of continuous physical presence once deportation proceedings began, and "some Federal courts permit[ted] aliens to continue to accrue time toward the seven year threshold even after they ha[d] been placed in deportation proceedings." *Ibid.* Aliens exploited this gap to circumvent the continuous-physical-presence requirement in various ways. See *ibid.* For example, "aliens in deportation proceedings" often either "knowingly filed meritless applications for relief or otherwise exploited administrative delays in the hearing and appeal processes in order to 'buy time,' during which they could acquire a period of continuous presence that would qualify them for forms of relief that were unavailable to them when proceedings were initiated." *In re Cisneros*, 23 I. & N. Dec. 668, 670 (B.I.A. 2004) (discussing legislative history); see *INS* v. *Rios-Pineda*,

471 U.S. 444, 450 (1985) (describing aliens' "incentive" to "stall[] physical departure in the hope of eventually satisfying" the seven-year requirement). Similarly, "aliens who failed to appear for their deportation proceedings and were ordered deported in absentia" could "then seek to re-open proceedings once the requisite time ha[d] passed." House Report 122.

ii. In 1996, to address these and other concerns, Congress "replace[d]" suspension of deportation with a new form of relief—cancellation of removal under 8 U.S.C. 1229b(b)—which "limit[ed] the categories of illegal aliens eligible for such relief and the circumstances under which it may be granted." Conf. Report 213; see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III, Subtit. A, sec. 304(a)(3), § 240A, 110 Stat. 3009-594 to 3009-596; see also House Report 108. To address concerns that discretionary relief had become too widely available, IIRIRA raised the threshold showing of hardship for nonpermanent-resident aliens—permitting cancellation of removal only if the alien demonstrates "exceptional and extremely unusual hardship"—and extended the required period of continuous physical presence from seven years to ten. 8 U.S.C. 1229b(b)(1)(D); see Conf. Report 213-214. Congress also prohibited cancellation of removal for (among others) aliens who have been convicted of certain criminal offenses or are removable on certain security-related grounds. 8 U.S.C. 1229b(b)(1)(C) and (c)(4).[4]

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[4] Different criteria apply to aliens admitted as lawful permanent residents who seek cancellation of removal. 8 U.S.C. 1229b(a). Among other things, such aliens must demonstrate seven years of "continuous residence" after admission "in any status" to be eligible for relief. 8 U.S.C. 1229b(a)(2).

Thus, to be eligible for cancellation of removal after IIRIRA, a nonpermanent-resident alien must (1) have been physically present in the United States for a continuous period of at least ten years; (2) have been a person of good moral character during that period; (3) have not been convicted of certain designated crimes; and (4) establish that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is either a citizen of the United States or a lawful permanent resident. 8 U.S.C. 1229b(b)(1)(A)-(D). If the applicant meets those threshold eligibility criteria, whether a favorable exercise of discretion is warranted depends on a balancing of "the favorable and adverse factors" of the alien's particular case. *In re A-M-*, 25 I. & N. Dec. 66, 76 (B.I.A. 2009). In addition, IIRIRA set an annual cap barring the Attorney General from cancelling the removal of more than 4000 aliens in a single fiscal year. 8 U.S.C. 1229b(e)(1).

To address concerns that aliens continued to accrue continuous-physical-presence time even while removal proceedings were ongoing, IIRIRA adopted the provision at issue here, often referred to as the stop-time rule. 8 U.S.C. 1229b(d)(1). The stop-time rule states that a nonpermanent-resident alien's period of continuous physical presence is "deemed to end" upon the occurrence of the earlier of two events: (A) "when the alien is served a notice to appear under section 1229(a)"; or (B) the alien's commission of one of certain criminal offenses that would render the alien either inadmissible or deportable. *Ibid.* Thus, once an alien is served with a

notice to appear, he no longer accrues continuous-physical-presence time.[5]

2. a. Petitioner is a native and citizen of Brazil. Pet. App. 3a. In June 2000, he was admitted to the United States as a temporary nonimmigrant visitor for six months. *Ibid.* When the six months ended in December 2000, however, petitioner did not honor the terms and conditions of his visa and admission by departing; instead, he remained for years. *Ibid.*

In May 2006—nearly five-and-a-half years later—petitioner was arrested in Massachusetts (for the second time) for operating a vehicle while under the influence. A.R. 39-42, 195; see Pet. App. 22a; J.A. 21. On May 31, 2006, while petitioner was detained, DHS personally served him with a notice to appear. See Pet. App. 3a, 18a; J.A. 7-13 (A.R. 217-218); A.R. 199. Petitioner signed the notice to appear confirming that it was personally served. J.A. 12-13 (A.R. 218); see J.A. 49 (A.R. 136).

The notice to appear informed petitioner that "removal proceedings under [8 U.S.C. 1229a]" were being initiated against him because he had been admitted to the United States but had stayed longer than authorized in violation of 8 U.S.C. 1227(a)(1)(B). J.A. 7-8 (A.R. 217). The notice recited the dates of petitioner's entry, relevant terms of his visa and admission, and other facts regarding his removability. *Ibid.* It stated that petitioner was "ordered to appear" for removal proceedings in the Boston immigration court "on a date to be set at a time to be set to show why [he] should not be removed." J.A. 9 (A.R. 217)

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[5] The same stop-time rule applies to end a lawful permanent resident's period of continuous residence. 8 U.S.C. 1229b(d)(1). Service of a notice to appear does not trigger the stop-time rule for aliens subject to special rules in Section 1229b(b)(2) (inapplicable here) for certain victims of domestic abuse. 8 U.S.C. 1229b(d)(1)(A).

(capitalization and emphasis omitted). The notice provided information about the conduct of the hearing and the consequences of failing to appear. J.A. 10 (A.R. 218). It also informed petitioner that, if he chose, he could be represented by counsel, and that a list of qualified attorneys who might be available to represent him pro bono would be provided. J.A. 10, 12 (A.R. 218).

The notice to appear listed petitioner's street address in Oak Bluffs, Massachusetts. J.A. 7 (A.R. 217). In accordance with Section 1229(a), it instructed petitioner that he was "required to provide the [Immigration and Naturalization Service (INS)]"—some of whose functions have been transferred to DHS—"in writing, with [his] full mailing address and telephone number," and that he also "must notify the Immigration Court immediately by using Form EOIR-33 whenever [he] change[d] [his] address or telephone number during the course of this proceeding." J.A. 11 (A.R. 218).

b. On August 9, 2007, DHS filed the notice to appear with the Boston immigration court, Gov't C.A. Br. 3; see J.A. 7-13 (A.R. 217), which formally commenced removal proceedings, see 8 C.F.R. 1003.14(a), 1239.1(a). On September 21, 2007, the immigration court mailed a notice of hearing to the street address listed for petitioner on his May 2006 notice to appear, informing him that a hearing would be held in his case on October 31, 2007, at the Boston immigration court. J.A. 14-16 (A.R. 216). Petitioner failed to appear at that hearing and was ordered removed in absentia. Pet. App. 3a; see J.A. 17 (A.R. 209). The immigration court mailed the in absentia removal order to the same address. A.R. 208.

c. In March 2013, five and-a-half years after he was ordered removed, petitioner was arrested again for a motor-vehicle violation and detained by DHS. Pet. App.

3a; see A.R. 43-45. Upon being informed of the removal order, petitioner retained counsel and moved to reopen the proceedings. Pet. App. 3a. Petitioner asserted that he never received the notice of hearing indicating the date of the 2007 hearing because it had been mailed to his "physical residential address," not his "mailing address"—a post-office box in a different town—and that the notice and removal order sent by the immigration court had been returned as undeliverable. J.A. 19, 21 (A.R. 194-195); Pet. App. 3a. The IJ granted petitioner's motion and reopened the proceedings, Pet. App. 3a, and a new hearing date was set, J.A. 33 (A.R. 215).[6]

During the reopened proceedings, petitioner "concede[d] proper service of the Notice to Appear, dated 05/31/06," and he further "concede[d]" all of the allegations and the charge of removability set forth in that notice. J.A. 38-39 (A.R. 147); Pet. App. 3a-4a. Petitioner, represented by counsel, requested cancellation of removal (and other discretionary relief). *Ibid.* He contended that he satisfied the ten-year continuous-physical-presence requirement because he had been present in the United States since June 2000. A.R. 116. Petitioner argued that the notice to appear served on him in 2006 "had not 'stopped' the continuous residency clock" because it "did not include the date and time of his hearing." Pet. App. 4a; see A.R. 116-118, 125-126, 142. According to petitioner, his continuous physical presence did not end under the stop-time rule until he received notice of the specific hearing date and time after his removal proceedings were reopened in 2013. Pet. App. 4a.

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[6] This Office has been informed by DHS that petitioner had previously provided the post-office box address to DHS, but it does not appear that that address was supplied to the immigration court.

Following a hearing, the IJ denied petitioner's cancellation application and ordered him removed. Pet. App. 20a-24a (A.R. 79-83). The IJ rejected petitioner's contention that the May 2006 notice to appear had not triggered the stop-time rule, opining that "the law is quite settled that DHS need not put a date certain on the Notice to Appear in order to make that document effective," and therefore the omission of a date and time certain did not "somehow * * * negate the service of the Notice to Appear insofar as it would cut off [petitioner's] continuous physical presence." *Id.* at 23a (A.R. 81). The IJ accordingly concluded that petitioner was "statutorily ineligible to submit [a cancellation-of-removal] application." *Ibid.* (A.R. 82).[7]

3. The Board affirmed. Pet. App. 17a-19a (A.R. 7-8). It agreed with the IJ that petitioner was ineligible for cancellation of removal because he did not satisfy the ten-year continuous-physical-presence requirement. *Id.* at 18a (A.R. 7). The Board rejected petitioner's contention that the May 2006 notice to appear was insufficient to trigger the stop-time rule, relying on its precedential decision in *In re Camarillo*, 25 I. & N. Dec. 644 (2011), in which it had held that "an alien's period of continuous physical presence for cancellation of removal is deemed to end upon service of the Notice to Appear even if the Notice to Appear does not include the date and time of the hearing." Pet. App. 18a (A.R. 7).

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[7] Petitioner also requested voluntary departure, but he withdrew that request. Pet. App. 4a n.2; see *id.* at 24a (A.R. 82); A.R. 66, 124, 143, 147. In addition, petitioner had requested that DHS exercise its prosecutorial discretion to allow petitioner to remain, and the IJ postponed the proceedings to allow petitioner to request such an exercise of discretion (and to allow petitioner to benefit from potential intervening legislation), but DHS denied that request. Pet. App. 4a, 22a.

In *Camarillo*, the Board conducted a detailed analysis of the "language and design of the statute, the applicable regulations, and the congressional intent behind the provisions of section [1229b(d)(1)]" and "conclude[d] that the DHS's service of a notice to appear triggers the 'stop-time' rule, regardless of whether the date and time of the hearing have been included in the document." 25 I. & N. Dec. at 651. The Board acknowledged that Section 1229b(d)(1)'s language standing alone could bear more than one interpretation, but it determined that "the best reading of the statute as a whole is that Congress intended the phrase 'under section [1229(a)]' after 'notice to appear' to specify the document the DHS must serve on the alien to trigger the 'stop-time' rule." *Id.* at 647; see *id.* at 647-651.

Applying *Camarillo*, the Board concluded here that personal service on petitioner of the May 2006 notice to appear ended his period of continuous physical presence, rendering him ineligible for cancellation of removal. See Pet. App. 18a (A.R. 7). It declined petitioner's request to reconsider *Camarillo* and accordingly dismissed petitioner's appeal. *Ibid.*

4. The court of appeals denied petitioner's petition for review. Pet. App. 1a-16a. The court joined six other circuits that had addressed the issue since *Camarillo* in sustaining the Board's position that service of a notice to appear is effective to stop the accrual of continuous physical presence, even if that notice lacks a date and time certain for the initial hearing. *Id.* at 2a, 15a & n.8.

Consistent with petitioner's argument below, the court of appeals considered the Board's interpretation of the INA under the framework of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 5a; see Pet. C.A. Br. 10, 12. The

court rejected petitioner's contention that the text of Section 1229b(d)(1) "unambiguously requires that the notice include all of the information specified in § 1229(a)(1)" to "trigger the stop-time rule." Pet. App. 7a; see *id.* at 7a-9a. Section 1229b(d)(1), it reasoned, "does not explicitly state that the date and time of the hearing must be included in a notice to appear in order to cut off an alien's period of continuous physical presence." *Id.* at 9a. It also reasoned that Section 1229b(d)(1)'s "reference to a notice to appear 'under' § 1229(a) does not clearly indicate whether the rule incorporates the requirements of that section." *Ibid.*

The court of appeals found unpersuasive petitioner's argument—adopted by the only circuit that has disagreed with the Board's position—that "§ 1229(a)(1)'s commandment that a notice to appear specifying the ten pieces of information listed '*shall* be given in person to the alien'" compelled a contrary result. Pet. App. 8a (quoting *Orozco-Velasquez* v. *Attorney Gen. U.S.*, 817 F.3d 78, 83 (3d Cir. 2016)). "The word 'shall,'" the court explained, "appears in § 1229(a)(1), not in the stop-time rule itself." *Ibid.* "It is undisputed," the court observed, "that § 1229(a)(1) creates a duty requiring the government to provide an alien with the information listed in that provision." *Ibid.* "But whether a notice to appear that omits some of this information nonetheless triggers the stop-time rule," it explained, "is a different question." *Ibid.* The court concluded that, "even if such an omission renders a notice to appear defective" for purposes of Section 1229(a), it does not follow that service of the notice is insufficient to trigger the stop-time rule. *Ibid.* The court analogized this circumstance to *Becker* v. *Montgomery*, 532 U.S. 757 (2001), in which this Court "held that an unsigned notice of appeal could qualify as

timely filed, even if the missing signature was not provided within the filing period." Pet. App. 8a. "Here, just as there," the court of appeals held, "the missing item may be a 'curable' defect that does not prevent the notice from serving its purpose." *Ibid.*

The court of appeals further concluded that the Board's interpretation reflects a "permissible construction of the stop-time rule." Pet. App. 10a; see *id.* at 9a-15a. The court agreed with the Board's reasoning in *Camarillo* that the statutory structure supported its interpretation. *Id.* at 10a-11a. Given that Section 1229(a) is the "'primary reference in the INA to the notice to appear,'" it is "logical" to construe the phrase "'under section 1229(a)'" in the stop-time rule as merely "specif[ying] the document the DHS must serve on the alien to trigger the 'stop-time' rule." *Ibid.* (quoting *Camarillo*, 25 I. & N. Dec. at 647) (brackets omitted). In contrast, the court explained, "[i]t would make little sense for the stop-time rule's reference to 'a notice to appear under section 1229(a)' to condition the triggering of the rule on the fulfillment of all of the requirements of § 1229(a), which include not just notification of the initial date and time of the removal hearing" but also subsequent changes to the hearing date. *Id.* at 11a.

The court of appeals also found that the statutory history and purpose supported the Board's interpretation. Pet. App. 12a-14a. The rule was enacted, the court observed, to close a "legal loophole" that had permitted an alien's continuous physical presence for purposes of cancellation of removal to be calculated without regard to "'whether or when the [INS] had initiated deportation proceedings against the person.'" *Id.* at 12a-13a (quoting *Camarillo*, 25 I. & N. Dec. at 650). "Given Congress's intent in enacting IIRIRA to prevent notice

problems from dragging out the deportation process," the court concluded, "it would make little sense for Congress to have created the potential for further delays by conditioning the activation of the stop-time rule on the receipt of a hearing notice that may come months, or even years, after the initiation of deportation proceedings by DHS." *Id.* at 14a. The court also found reasonable the Board's consideration of the practical realities of the administrative context, including the facts that the hearing date is determined not by DHS, but by the immigration court (housed in the Department of Justice), and that information about the hearing date is often unavailable to DHS when it serves the notice. *Ibid.*

The court of appeals accordingly agreed with the Board's conclusion that petitioner's period of continuous physical presence ended when he was served with a notice to appear in 2006. Pet. App. 15a-16a. It held that petitioner was ineligible for cancellation of removal. *Ibid.*

SUMMARY OF ARGUMENT

The INA's stop-time rule provides that an alien's period of continuous physical presence ends when the alien is "served a notice to appear under section 1229(a)." 8 U.S.C. 1229b(d)(1). The Board has construed that provision to mean that a notice to appear that contains all of the information called for by Section 1229(a) except the date and time certain of the alien's initial hearing triggers the stop-time rule. That interpretation reflects the best reading of the statute, and at least a reasonable reading that warrants deference.

A. The Board's interpretation reflects the best understanding of the statutory text in light of its context and the statute's structure, history, and purpose.

1. This Court's decisions make clear that an act "under" a statute is most naturally read to mean an act

subject to or governed by that statute—not necessarily an act that conforms perfectly to all of the statute's requirements. The context here strongly supports that reading. When Congress intended in IIRIRA to refer to compliance with Section 1229(a) and to attach consequences to noncompliance, it did so expressly. The phrase "under section 1229(a)," 8 U.S.C. 1229b(d)(1), would also be an unlikely way to condition triggering of the stop-time rule on issuance of a notice to appear containing all of the information specified for such a notice, which is set forth only in Section 1229(a)(1). It is especially unlikely that Congress intended omission of a specific hearing date in the initial notice to be fatal because Congress provided in Section 1229(a)(2) that a hearing date may later be changed upon further written notice.

Petitioner's contrary arguments lack merit. He asserts (Br. 26) that Section 1229(a) "defines" a notice to appear as a document that meets all of that provision's requirements. That is not what the statute says, and petitioner's reasoning is inconsistent with this Court's precedent. The Court has held, for example, that a notice of appeal that omits a required signature is still sufficient to satisfy a jurisdictional appeal deadline, even if that defect is corrected only after the deadline. *Becker* v. *Montgomery*, 532 U.S. 757, 762-768 (2001). Petitioner's fear that the Board's reading would invite DHS to serve notices that omit all of the specified information is unfounded. The Board has held that only a notice to appear that is actually filed, thus commencing removal proceedings, triggers the stop-time rule.

2. The statute's history and purpose reinforce the Board's reading of the text and context. Congress enacted the stop-time rule as part of a broader overhaul

of discretionary-relief proceedings in which it emphatically expressed its intent to restrict the availability of such relief. And it adopted the stop-time rule to prevent scenarios, like this case, where an alien who is removable and ineligible for discretionary relief can evade the eligibility requirements by continuing to accrue continuous-physical-presence time while his removal proceeding is ongoing. It is especially unlikely that Congress viewed inclusion of a date and time certain for an initial hearing as essential to the stop-time rule. The initial hearing date—which can be changed—has nothing to do with the stop-time rule's application or its purposes.

Petitioner's contention that Congress was concerned solely with preventing aliens from delaying already-commenced proceedings is incorrect. The history shows that Congress's concerns were broader. In any event, petitioner's reading may also create incentives for delay. His reliance on the history of IIRIRA's replacement of the prior regime is also misplaced. The history reflects that Congress viewed the changes petitioner cites as insignificant. Indeed, an amendment to IIRIRA adopted a year later—applying the stop-time rule to pre-IIRIRA orders to show cause—shows that Congress intended the stop-time rule to function the same way in the old and new regimes alike. Petitioner's observation that the stop-time rule concerns only eligibility for discretionary relief does not help him. Cancellation of removal is indeed a form of administrative grace, not an entitlement. But IIRIRA was designed to narrow the availability of that relief and prevent exploitation of technical loopholes by aliens not eligible for relief.

B. The Board's reading reflects at least a reasonable interpretation entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*,

467 U.S. 837 (1984). *Chevron* applies to the Board's interpretation of the INA. And its interpretation here is at a minimum "permissible." *Id.* at 843. In addition to the statutory text, context, structure, history, and purpose, practical realities of removal proceedings support its position. Under federal regulations in force when the stop-time rule was enacted and today, hearing dates are determined not by DHS, but by the immigration court that conducts the hearings. Often it is impracticable, for reasons beyond DHS's control, to provide a hearing date when serving the notice to appear; in those cases, the immigration court provides the hearing date later. The Board sensibly determined that Congress did not intend aliens' eligibility for relief offered as a matter of grace to turn on that happenstance of administrative procedure.

Petitioner's contrary arguments are incorrect. He contends that any ambiguity in statutes governing removal should be resolved in the alien's favor. That position contradicts this Court's decisions deferring to the Board's reading of the INA and misreads the decisions on which petitioner relies. He also argues that the Board's reading of the stop-time rule is inconsistent with its holding in *In re Ordaz*, 26 I. & N. Dec. 637 (B.I.A. 2015), that only a notice to appear that is actually filed to commence a proceeding triggers the stop-time rule. But as the Board explained, the two statutory questions are distinct, and the Board's determination that the stop-time rule is not nullified by the omission of a specific hearing date does not implicate the same concerns as the issue it addressed in *Ordaz*.

ARGUMENT

SERVICE ON AN ALIEN OF A NOTICE TO APPEAR STOPS HIS ACCRUAL OF CONTINUOUS PHYSICAL PRESENCE IRRESPECTIVE OF WHETHER THE NOTICE STATES A DATE AND TIME CERTAIN FOR THE INITIAL HEARING

The INA permits certain nonpermanent-resident aliens who are unlawfully present in the United States to be considered for cancellation of removal only if the alien can establish (*inter alia*) that he "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of" the application. 8 U.S.C. 1229b(b)(1)(A). The INA provides that an alien's period of continuous physical presence is "deemed to end * * * when the alien is served a notice to appear under section 1229(a)." 8 U.S.C. 1229b(d)(1). The Board has interpreted Section 1229b(d)(1)'s stop-time rule to apply when a notice to appear is served if the notice either specifies a date and time certain for the alien's initial hearing, or instead indicates that the date and time remain to be determined. See *In re Camarillo*, 25 I. & N. Dec. 644, 646-651 (2011). Under this Court's precedents, that interpretation controls so long as it reflects "a permissible construction of the statute." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (quoting *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

The Board's position in fact embodies the best reading of the INA's text in light of the statutory context, structure, history, and purpose. At a minimum, as all of the courts of appeals to address the issue save one have held, it reflects a reasonable interpretation of the statute that is entitled to deference. Petitioner falls far short of carrying his burden of showing either that the

statute unambiguously compels his contrary reading or that the Board's interpretation is unreasonable.

A. The Board's Conclusion That The Omission In A Notice To Appear Of A Date And Time Certain For A Hearing Does Not Nullify The Stop-Time Rule Reflects The Best Reading Of The Statute

In construing any statute, "[t]he beginning point is the relevant statutory text." *United States* v. *Quality Stores, Inc.*, 134 S. Ct. 1395, 1399 (2014). Courts "interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" *Abramski* v. *United States*, 134 S. Ct. 2259, 2267 (2014) (citation omitted). "All those tools"—"not to mention common sense," *ibid.*—support the Board's interpretation of the INA here.

1. The statutory text, context, and structure support the Board's interpretation of the stop-time rule

a. The Board's holding that service of a notice to appear triggers Section 1229b(d)(1)'s stop-time rule even if the notice does not contain a date and time certain for the initial hearing reflects the best reading of the statutory text in light of its context and structure. Section 1229b(d)(1) provides that, "[f]or purposes of [Section 1229b], any period of * * * continuous physical presence in the United States shall be deemed to end" when the "earliest" of two events occurs: (A) "when the alien is served a notice to appear under section 1229(a) of [Title 8]," with an exception not relevant here; or (B) "when the alien has committed an offense referred to in section 1182(a)(2) of [Title 8]" that renders the alien either inadmissible or removable under certain INA provisions. 8 U.S.C. 1229b(d)(1). The most natural reading of "when the alien is served a notice to appear under section

1229(a)" is that it identifies the kind of document that must be served to trigger the stop-time rule—not that the notice must include a not-yet-determined hearing date as a condition precedent to stopping the accrual of the alien's continuous-physical-presence time.

i. Section 1229b(d)(1)'s text "identifies a form that must be served on the immigrant" to stop his accrual of continuous physical presence: "a 'notice to appear under section 1229(a),'" *i.e.*, "an I-862 notice-to-appear form." *Gonzalez-Garcia* v. *Holder*, 770 F.3d 431, 434 (6th Cir. 2014) (Sutton, J.) (citation omitted). But "[i]t does not say that only a form that contains every item" listed in Section 1229(a)(1), "including yet-to-be-determined dates for a hearing, stops the ten-year clock." *Ibid.*; accord *Yi Di Wang* v. *Holder*, 759 F.3d 670, 674 (7th Cir. 2014) (Wood, C.J.) ("[Section 1229b(d)(1)] says nothing about whether a Notice to Appear, in order to function for the stop-time rule, must include the date and time of a hearing."). Although it refers to a notice "under section 1229(a)," the best reading of that phrase—and certainly a permissible one—is that the notice must be one subject to or governed by Section 1229(a), not that the notice must be flawless to trigger the stop-time rule.

"The word 'under,'" this Court has explained, is a "chameleon" that "'has many dictionary definitions and must draw its meaning from its context.'" *Kucana* v. *Holder*, 558 U.S. 233, 245 (2010) (quoting *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991)); see *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 531 (2013) (word "'under'" "evades a uniform, consistent meaning"). Among other things, in some settings it can mean "subject to" or "suffering restriction, restraint, or control by," while in others it can signify "in accordance with." *Kirtsaeng*, 568 U.S. at 530-531 (citations omitted); see

id. at 562-563 (Ginsburg, J., dissenting); *e.g.*, *Webster's Third New International Dictionary* 2487 (2002); 18 *Oxford English Dictionary* 947-951 (2d ed. 1989); *Webster's New International Dictionary* 2765 (2d ed. 1949).

As this Court has further explained, however, to say "that a thing that is 'under' a statute is most naturally read as being 'subject to' or 'governed by' the statute," or close equivalents. *Florida Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 39 (2008) (citation omitted); see *In re Hechinger Inv. Co. of Delaware, Inc.*, 335 F.3d 243, 252 (3d Cir. 2003) (Alito, J.) ("When an action is said to be taken 'under' a provision of law or a document having legal effect, what is generally meant is that the action is 'authorized' by the provision of law or legal document."). Earlier this Term, for example, the Court concluded that a statute addressing judicial review of an agency's "action * * * in approving or promulgating any effluent limitation or other limitation under section 1311" of the Clean Water Act, 33 U.S.C. 1369(b)(1)(E), "is most naturally read to mean that the effluent limitation or other limitation must be approved or promulgated 'pursuant to' or 'by reason of the authority of' § 1311," *National Ass'n of Mfrs.* v. *Department of Def.*, 138 S. Ct. 617, 630 (2018) (citing *St. Louis Fuel & Supply Co.* v. *FERC*, 890 F.2d 446, 450 (D.C. Cir. 1989) (R.B. Ginsburg, J.) ("'under'" in 5 U.S.C. 504(b)(1)(C) "means 'subject or pursuant to' or 'by reason of the authority of'" (brackets omitted)); see *Hechinger*, 335 F.3d at 252 ("[I]f a claim is asserted 'under' 42 U.S.C. § 1983, Section 1983 provides the authority for the claim. If a motion is made 'under' [Federal Rule of Civil Procedure] 12(b)(6), that rule provides the authority for the motion.").

Action "under" a statute or rule in this sense does not ordinarily refer only to action that in fact satisfies every requirement imposed by the statute or rule. Rather, it more naturally means simply that the statute or rule establishes the requirements that apply. For example, Federal Rule of Civil Procedure 26(e) requires "[a] party who has made a disclosure under Rule 26(a)" to "supplement or correct its disclosure * * * if the party learns that in some material respect" its disclosure was "incomplete or incorrect." Fed. R. Civ. P. 26(e)(1)(A). A disclosure that needs to be supplemented or corrected because it was "incomplete or incorrect" necessarily did not comply with Rule 26(a) in the first instance, yet Rule 26(e) refers to it as a "disclosure under Rule 26(a)." *Ibid.* Similarly, provisions that address judicial review of action "under" particular statutes, like the Clean Water Act provision the Court addressed in *National Association of Manufacturers*, *supra*, do not presuppose that the action complies with the relevant statute in every respect. 33 U.S.C. 1369(b)(1)(E); see also, *e.g.*, 28 U.S.C. 2342(2) and (6); 42 U.S.C. 7607(b)(1); 47 U.S.C. 402(a). Indeed, often a party seeks judicial review of agency action on the ground that the action allegedly did *not* comply with the governing law.

So, too, the phrase "served a notice to appear under section 1229(a)" in Section 1229d(b)(1) is best read to mean service of a notice that is subject to or governed by, or issued under the authority of, Section 1229(a). In context, "under section 1229(a)" does not naturally signify that only service of a notice that satisfies Section 1229(a) in every respect stops the clock, or that any defect or omission in the notice, however technical or trivial, allows the alien's continuous-physical-presence time to continue accruing.

ii. Three aspects of the particular context of Section 1229b(d)(1) reinforce this most natural reading of its text and strongly indicate that Congress did not intend the absence of a yet-to-be-determined date and time certain for a hearing to prevent the stop-time rule from being triggered.

First, the immediately preceding section of IIRIRA shows that, when Congress wished to refer to satisfaction of Section 1229(a)'s requirements—and wished to attach consequences to compliance or noncompliance with them—it did so expressly. Section 1229a provides that an alien may be removed in absentia only "if [DHS] establishes by clear, unequivocal, and convincing evidence" that "written notice *required under* paragraph (1) or (2) of section 1229(a) of [Title 8] has been provided to the alien or the alien's counsel" but the alien "does not attend a proceeding." 8 U.S.C. 1229a(b)(5)(A) (emphasis added). It further provides that, once an in absentia removal order is entered, the alien may seek to reopen the proceeding if (*inter alia*) "the alien demonstrates that the alien did not receive notice *in accordance with* paragraph (1) or (2) of section 1229(a)." 8 U.S.C. 1229a(b)(5)(C)(ii) (emphasis added).

Congress's use of that different text in Section 1229a is a powerful indication that "notice to appear under section 1229(a)" in Section 1229b(d)(1) is not oblique shorthand for a notice that satisfies all of Section 1229(a)(1)'s requirements. Courts presume that Congress's choice of different language in provisions of the same statute is deliberate. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely

in the disparate inclusion or exclusion." (brackets and citation omitted)). Courts accordingly should "refrain from concluding" that "differing language" in a statute's "subsections has the same meaning in each" and should "not presume to ascribe [such a] difference to a simple mistake in draftsmanship." *Ibid.*; see, *e.g.*, *DHS* v. *MacLean*, 135 S. Ct. 913, 919 (2015); *United States* v. *Bean*, 537 U.S. 71, 76 n.4 (2002). The fact that Congress referred expressly in Section 1229a to written notices "in accordance with" and "required under" Section 1229(a)(1) and (2)—and imposed consequences for complying (or not complying) with those provisions' requirements—strongly indicates that "under section 1229(a)" in Section 1229b(d)(1) does not mean the same thing.[8]

Section 1229a further illustrates that, when Congress desired to attach significance to whether an alien was actually informed of a specific hearing date, it could and did say so expressly. Section 1229a(b)(7) states that an alien ordered removed in absentia is ineligible for various forms of discretionary relief (including cancellation of removal) for ten years after entry of the final order of removal if the alien, "at the time of the notice described in paragraph (1) or (2) of section 1229(a) of [Title 8], was

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[8] Another nearby provision, 8 U.S.C. 1229c(b)(1)(A), also refers to service of a notice to appear "under section 1229(a)" in the same way as Section 1229b(d)(1), for the same purpose. Section 1229c(b)(1)(A) provides that, at the conclusion of a removal proceeding, an alien may request "voluntary departure in lieu of removal" if the alien shows (*inter alia*) that he was "physically present in the United States" for at least one year before "the date the notice to appear was served under section 1229(a)." *Ibid.* Congress's repeated use of this different phrasing in establishing threshold requirements for discretionary relief confirms that its choice of words in Section 1229b(d)(1) was intentional.

provided oral notice * * * of the time and place of the proceedings and of the consequences" of failing to appear. 8 U.S.C. 1229a(b)(7). That provision's express reference to, and its imposition of an additional consequence upon, an alien's receipt of oral notice of a hearing date makes it even less likely that Congress implicitly intended omission of a date certain for a hearing to nullify the stop-time rule.

Second, Section 1229b(d)(1)'s broad cross-reference to "section 1229(a)" in its entirety further weakens any inference that "notice to appear under section 1229(a)" means only a notice that contains all required information. See *Camarillo*, 25 I. & N. Dec. at 647-648. Only one part of Section 1229(a), paragraph (a)(1), addresses the information a notice is to contain. The other portions address different issues: paragraph (a)(2) addresses changes in the date and time of the hearing in already-commenced proceedings, and paragraph (a)(3) provides for a system to record aliens' addresses and phone numbers. 8 U.S.C. 1229(a)(2) and (3). Section 1229b(d)(1)'s reference to all of Section 1229(a)—two-thirds of which does not address notices to appear—would be an unusual way to convey that the stop-time rule is triggered only by perfect satisfaction of Section 1229(a)(1). See *Cyan, Inc.* v. *Beaver Cnty. Emps. Ret. Fund*, No. 15-1439 (Mar. 20, 2018), slip op. 9 (applying presumption that, "when Congress wants to refer only to a particular subsection or paragraph, it says so" (brackets and citation omitted)). Nor can Congress's reference to all of Section 1229(a) be dismissed as inadvertent: it elsewhere referred to Section 1229(a)(1) (and (a)(2)) specifically, a choice courts should presume Congress made "intentionally and purposely." *Russello*, 464 U.S. at 23 (citation omitted); see 8 U.S.C. 1229a(b)(5)(A), (C)(ii), and

(7).[9] See also 8 U.S.C. 1774(a) (requiring annual report on the "number of aliens" who failed to attend a removal hearing "after having been arrested outside a port of entry, served a notice to appear *under section 1229(a)(1)* of this title, and released on the alien's own recognizance" (emphasis added)).

Petitioner observes (Br. 34) that overbroad cross-references within federal statutes are not uncommon. But petitioner does not explain why Congress would have chosen a different, more expansive cross-reference in Section 1229b than it used repeatedly elsewhere if it intended them to mean the same thing. The most logical explanation is that, whereas Section 1229a is concerned with whether the alien receives all the information Section 1229(a)(1) specifies, Section 1229b(d)(1) is not. Section 1229b(d)(1) refers to service of a notice to appear merely to mark a point in time when an alien's period of continuous physical presence ends. Its generic reference to Section 1229(a) simply clarifies which kind of notice stops the clock.

Third, Section 1229(a)(2)—which Section 1229b(d)(1)'s broad cross-reference encompasses—shows that it is highly unlikely Congress intended the omission of a date and time certain for an initial hearing in a notice to appear to be pivotal for stop-time purposes. Section 1229(a)(2) expressly contemplates that the hearing date (or location) may be "change[d]" after the alien is served with the notice to appear. 8 U.S.C. 1229(a)(2)(A). The only restriction on such changes is that the alien

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[9] The fact that Section 1229a(b)(5) refers to both paragraphs (a)(1) and (a)(2) reflects that an alien's receipt of either the original notice to appear or a subsequent notice modifying the hearing date or location suffices for purposes of Section 1229a.

must be served—personally, or by mail "if personal service is not practicable"—with written notice of "the new time or place of the proceedings" and a reminder of the consequences of failing to appear. *Ibid.* Even that notice is not "required" if the alien has failed to keep his address on file with the Attorney General current. 8 U.S.C. 1229(a)(2)(B).

Given that the statute specifically permits the date of an alien's hearing to be changed, it is improbable that Congress viewed the inclusion of a date and time certain in the initial notice to appear as essential to the stop-time rule. Under Section 1229(a)(2)(B)'s plain terms, any hearing date provided initially can be superseded at any time by a new one, rendering the date given in the original notice irrelevant. Petitioner observes (Br. 35) that the statute's reference to a "change" in the hearing date presupposes that a date had already been set. That misses the critical point: there is no reason why Congress would have insisted on providing a specific hearing date as a prerequisite to triggering the stop-time rule when any date supplied could become defunct.

To be sure, the fact that a hearing date can be changed does not mean DHS need never provide one. Unless DHS can demonstrate through "clear, unequivocal, and convincing evidence" that the alien was apprised of an original or modified hearing date, it cannot obtain his removal in absentia based on the alien's failure to appear. 8 U.S.C. 1229a(b)(5)(A). And if an in absentia removal order is entered, the case can be reopened if the alien shows he did not receive notice of the original or modified hearing date "in accordance with" Section 1229(a)(1) or (2). 8 U.S.C. 1229a(b)(5)(C)(ii). Congress thus anticipated that failure to provide notice of a specific hearing date could prejudice the alien, and it

adopted those provisions to address that possibility. But given that Congress expressly provided for a hearing date to be changed after service of the notice that triggers the stop-time rule, there is no reason to assume that Congress intended the omission of a date certain in the original notice to be fatal.

The implications of a contrary interpretation illustrate its illogic. Under federal regulations in force both before IIRIRA and today, it is not DHS, but the immigration court—a component of a different agency, the Executive Office for Immigration Review (EOIR) in the Department of Justice—that "is responsible for scheduling cases" in removal proceedings, including "the initial removal hearing." 8 C.F.R. 1003.18(a) and (b); see 8 C.F.R. 242.1(b) (1995) (hearing date to be "specified by the Immigration Court").[10] The immigration court does not acquire jurisdiction until the notice to appear (or other "charging document") is "filed with the Immigration Court." 8 C.F.R. 1003.14(a); see 8 C.F.R. 1003.13, 1003.15. As Judge Sutton explained in *Gonzalez-Garcia*, interpreting Section 1229b(d)(1) to require the notice to include a hearing date to trigger the stop-time rule thus "would require [DHS] investigators to place hearing dates on all notices to appear whether [EOIR] was prepared to schedule them or not—an approach that might do more to confuse than inform immigrants about the process triggered by the notice." 770 F.3d at 434-435. It is difficult to imagine why Congress would have contemplated resort to that procedure—*i.e.*, supplying an aspirational future hearing date in the notice to appear,

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[10] Immigration judges (previously known as special inquiry officers) were once part of DHS's predecessor (INS), but since 1983 they have been a component of EOIR. See 8 C.F.R. 1003.0 *et seq.*; 48 Fed. Reg. 8038 (Feb. 25, 1983).

to be replaced later by the immigration court once it determines the actual hearing date—but not permitted DHS to inform the alien transparently (as it did here) that the hearing date is still "to be set." J.A. 9 (A.R. 17) (emphasis omitted).

b. Petitioner nevertheless contends (Br. 25-26) that the "statutory language is crystal clear" and "unambiguously" requires inclusion of a date and time certain to stop an alien's period of continuous physical presence. See *id.* at 24-30. Yet at the same time, petitioner acknowledges that the word "under" is susceptible of multiple meanings and must "draw[] its meaning from context." *Id.* at 28 (quoting *Ardestani*, 502 U.S. at 135). And the "most natural[] read[ing]" of "'under' a statute" in general, *Piccadilly Cafeterias*, 554 U.S. at 39, and by far the better reading in the specific context of Section 1229b(d)(1), contradicts petitioner's contention. See pp. 21-31, *supra*. Petitioner's claim that the text is pellucid in his favor thus cannot be correct. The most he might show is that a different reading of the statute is also possible and that it is therefore ambiguous. But even that would not help petitioner, because "to acknowledge ambiguity is not to conclude that all interpretations are equally plausible," *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987), and petitioner has not shown that his contrary reading of the stop-time rule is equally (let alone more) persuasive.

i. Petitioner principally argues (Br. 26, 28-29) that Section 1229(a) "defines the term 'notice to appear' as only a document that includes written notice of *all* the information required by the statute," and that the word "under" in Section 1229b(d)(1) "connects the stop-time rule's reference to a 'notice to appear'" to "§ 1229(a)'s

definition." See *id.* at 25-27, 29-30, 32, 34-35. That is incorrect. Section 1229(a) is not worded in the form of a definition, and in any event it does not "define" a notice to appear as only a document that fully recites all of the information that section sets forth. It simply prescribes that "written notice * * * shall be given" to the alien "specifying" certain information. 8 U.S.C. 1229(a)(1). Nor does 1229(a)(1)'s parenthetical phrase providing a shorthand label for the written notice to be given define a "notice to appear" as only a document that satisfies Section 1229(a)(1) in all respects.

Petitioner's position that "notice to appear" means only a notice that complies perfectly with all applicable statutory requirements—and that any defect or omission in a notice transforms it into some other document—is also at odds with this Court's precedents. In *Becker* v. *Montgomery*, 532 U.S. 757 (2001), for example, the Court unanimously held that a notice of appeal that was filed but not signed—as the applicable rules required—before the deadline established by Federal Rules of Appellate Procedure 3 and 4 for filing the notice was sufficient to commence an appeal. *Id.* at 762-768. The Court accepted that the rules required a signature and that the deadline for filing the notice was jurisdictional. *Id.* at 764-765. It nevertheless concluded that the notice was valid. *Id.* at 764-768.

Becker reasoned that, although Federal Rule of Civil Procedure 11(a) required a signature, it also spelled out the consequences of failing to sign a document and indicated that the omission could be cured. 532 U.S. at 764; see Fed. R. Civ. P. 11(a) (2000) ("An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party."). The appellant's failure to sign

the notice thus was not fatal because the appellant corrected the defect, even though he did so after the filing deadline. 532 U.S. at 765, 768. As the Court observed, it had previously deemed similar technical defects immaterial to the effectiveness of a filing "where no genuine doubt exist[ed] about who [was] appealing, from what judgment, to which appellate court," and the appellee in *Becker* conceded that it had adequate notice of those facts. *Id.* at 767; see *id.* at 762, 767-768 (citing *Smith* v. *Barry*, 502 U.S. 244, 248-249 (1992) (document intended as appellate brief may qualify as a notice of appeal), and *Foman* v. *Davis*, 371 U.S. 178, 181 (1962) (appeal improperly dismissed where notice of appeal was incomplete but record indicated which orders appellant sought to appeal)). Indeed, the Court noted that its own rules expressly contemplate that a petition for a writ of certiorari that does not comply with applicable requirements can nevertheless suffice to invoke the Court's jurisdiction if corrected within a prescribed time, even if the correction is made after the original deadline for filing the petition. *Id.* at 767 (citing Sup. Ct. R. 14.5).

Becker's commonsense reasoning and result support the Board's interpretation of the stop-time rule. Like the applicable rules in *Becker*, IIRIRA spells out specific consequences for failure to serve a notice that complies with Section 1229(a)(1), 8 U.S.C. 1229a(b)(5)(A) and (C)(ii), strongly indicating that omission of certain specific information does not negate the stop-time rule, see pp. 25-26, *supra*. And a notice to appear containing all required information besides a date and time certain for the hearing is more than sufficient to apprise an alien of the basis and nature of the proceedings. The alien does not need to know the specific hearing date to appreciate

that the government intends to seek her removal. Moreover, Congress specifically provided that any hearing date provided can be changed. 8 U.S.C. 1229(a)(2).

Petitioner's view, in contrast, cannot be squared with *Becker*'s logic. If petitioner's view were correct, the Court should have concluded that the rules imposing the signature and other requirements defined a notice of appeal as one that met all those requirements and that the document the appellant filed was therefore not a notice of appeal at all. Far from concluding that the notice of appeal filed was a nullity, however, the Court deemed it sufficient to satisfy a jurisdictional deadline.

This Court's decisions since *Becker* have applied the same sensible understanding in other settings. In *Edelman* v. *Lynchburg*, 535 U.S. 106 (2002), the Court upheld an Equal Employment Opportunity Commission regulation that permitted amendment of a timely filed Title VII discrimination charge to include a required—but previously omitted—verification, even if that amendment occurred outside the statutory charge-filing period. *Id.* at 115-118. In *Scarborough* v. *Principi*, 541 U.S. 401 (2004), the Court applied *Becker* and *Edelman* to hold that a timely application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412, could be amended after the statutory filing period to include the necessary allegation that the government's position in the underlying litigation was "not substantially justified." 541 U.S. at 413-419. And in *Gonzalez* v. *Thaler*, 565 U.S. 134 (2012), the Court concluded that the failure of a certificate of appealability to "indicate the issue on which [a defendant] had made a substantial showing of the denial of a constitutional right, as required by [28 U.S.C.] 2253(c)(3)," did not deprive the court of appeals of jurisdiction. *Id.* at 141; see *id.* at 140-145.

ii. Petitioner's remaining arguments lack merit. He asserts (Br. 33-34) that DHS and the Board cannot "pick and choose which" of Section 1229(a)(1)'s requirements to disregard. But that assertion assumes his conclusion that a notice to appear must contain all of the identified information to trigger the stop-time rule.

Petitioner also argues (Br. 29-30) that treating notices to appear that do not contain a date and time certain for the initial hearing as triggering the stop-time rule would allow "the government [to] seek an in absentia removal order without *ever* telling an immigrant when or where the hearing would be held." But the text of Section 1229a(b)(5) forecloses that possibility: an in absentia order cannot validly be entered—and if entered it can be rescinded through reopening—if the government fails to comply with Section 1229(a)'s requirements. That difference in the texts of Sections 1229a and 1229b undermines petitioner's reading of the stop-time rule.

Petitioner relatedly contends (Br. 29) that the Board's reading would render "largely meaningless" Section 1229(b)(1)'s requirement that an alien's hearing be scheduled at least ten days after he is served with a notice to appear. That is incorrect. The explicit purpose of Section 1229(b)(1)'s ten-day requirement is that "an alien be permitted the opportunity to secure counsel before the first hearing date." 8 U.S.C. 1229(b)(1). In no event may the hearing be scheduled earlier than ten days after the notice to appear is served, absent the alien's consent. *Ibid.* If the notice to appear omits a hearing date and one is subsequently set, it must be at least ten days after the original notice is served, thereby if anything affording the alien more time to secure counsel.

Petitioner additionally argues (Br. 31-32) that the Board's interpretation would enable DHS to trigger the

stop-time rule by serving a notice containing none of the information listed in Section 1229(a)(1). That question is not before the Court in this case; the only item petitioner argues was omitted was a specific hearing date. The Board did not address in this case or in *Camarillo* whether a notice to appear omitting other required information could trigger the stop-time rule.

In any event, petitioner's fear is unfounded. Much of the information Section 1229(a)(1) calls for does not vary from one case to another and is included in standardized language on the I-862 notice-to-appear form. See J.A. 10-12 (A.R. 218); cf. 8 U.S.C. 1229(a)(1)(A)-(B), (E)-(F), and (G)(ii). Of the items particular to each alien, DHS has no reason to omit the alleged acts, charges, and statutory provisions that form the basis for removal. 8 U.S.C. 1229(a)(1)(C) and (D). To commence removal proceedings, DHS must file the notice to appear with the immigration court. 8 C.F.R. 1239.1(a). A notice that did not state any basis for removability thus would be futile. Nor could DHS trigger the stop-time rule by serving blank notices to appear that it never files. Under Board precedent, the stop-time rule is triggered only if and when the alien is served with a notice to appear that is subsequently filed, *i.e.*, only if "proceedings are actually initiated on th[e] basis" of that notice. *In re Ordaz*, 26 I. & N. Dec. 637, 642 (B.I.A. 2015); see *id.* at 638-643. Petitioner identifies no instance in the circuits that have upheld the Board's position where a blank notice to appear was served or the stop-time rule was invoked based upon it. The Court should not adopt petitioner's illogical reading of the stop-time rule based on his unsupported conjecture.

2. The stop-time rule's history and purpose support the Board's interpretation

"Statutory construction * * * is a holistic endeavor," and "[a] provision that may seem ambiguous in isolation" may be "clarified by the remainder of the statutory scheme," including when "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). The history and purpose of the stop-time rule strongly support the Board's conclusion that the absence in a notice to appear of a date and time certain for a hearing does not render the stop-time rule inapplicable.

a. Congress enacted the stop-time rule in 1996 as part of IIRIRA's overhaul of removal procedures and the forms of discretionary relief aliens may seek. See pp. 6-9, *supra*. Members of Congress expressed concern that the precursor to cancellation of removal (suspension of deportation) and other forms of relief were being "abuse[d]," in turn impeding expeditious removal of aliens unlawfully present in the United States. House Report 122; see *id.* at 114-115, 118-125. In IIRIRA, Congress modified the relevant statutory provisions in multiple respects so that "[r]elief from deportation w[ould] be more strictly limited." *Id.* at 108. Among other things, IIRIRA "limit[ed] the categories of illegal aliens eligible for such relief and the circumstances under which it may be granted"; raised the standard nonpermanent-resident aliens must meet to be eligible; lengthened the period of continuous physical presence such an alien must accrue before seeking relief (from seven years to ten); and set an annual ceiling of 4000 on the number of aliens whose removal may be cancelled. Conf. Report 213; see pp. 6-9, *supra*.

As the court of appeals noted, "[t]he stop-time rule was enacted to address "perceived abuses arising from" a particular "legal loophole." Pet. App. 13a (internal quotation marks omitted). The pre-1996 statute contained no mechanism to stop an alien's accrual of continuous-physical-presence time once deportation proceedings began, and some courts accordingly "permit[ted] aliens to continue to accrue time toward the [then] seven year threshold even after they ha[d] been placed in deportation proceedings." House Report 122; see *Ram* v. *INS*, 243 F.3d 510, 513 (9th Cir. 2001). Aliens exploited that loophole by seeking to "buy time"—whether by delaying ongoing proceedings, or by failing to appear in proceedings and subsequently seeking to reopen them—and "during [that time] they could acquire a period of continuous presence that would qualify them for forms of relief that were unavailable to them when proceedings were initiated." *Camarillo*, 25 I. & N. Dec. 649 (citation omitted).

Congress adopted the stop-time rule to close that loophole. See *Camarillo*, 25 I. & N. Dec. at 649; see *Ram*, 243 F.3d at 513 (stop-time rule "fundamentally altered this system" in response to frequent "'abuse[]'" (citation omitted)); *Rojas-Reyes* v. *INS*, 235 F.3d 115, 120-121 (2d Cir. 2000) (similar). The rule eliminates an alien's ability to buy time by "deem[ing]" the alien's period of continuous physical presence "to end" when the alien is "served a notice to appear" (or when the alien commits certain crimes). 8 U.S.C. 1229b(d)(1). In turn, the rule significantly reduces an alien's incentive to delay removal proceedings, or to fail to appear and later seek to reopen them.

The statutory history and purpose strongly support the Board's position that the stop-time rule does not

hinge on whether a notice to appear includes every item of information enumerated in Section 1229(a)(1). A contrary rule would frustrate the stop-time rule's core objective by enabling removable aliens who are ineligible for cancellation of removal to *become* eligible by continuing to accrue continuous-physical-presence time after being notified that the government intends to remove them—solely because of a technical, immaterial omission in the notice of information unrelated to the alien's removability. For example, such a rule would enable an alien who has been present less than ten years, who receives a notice to appear containing all required information except that he will be provided a current list of available pro bono attorneys, but who has no difficulty obtaining representation to seek cancellation once the ten-year mark has been reached. Such a rule would in turn create similar incentives as the regime the stop-time rule replaced for the alien to delay the proceedings—or to fail to appear and seek to reopen the proceedings after the ten-year mark—and argue that the original notice to appear was a nullity. It is extremely unlikely that Congress, while closing one frequently exploited loophole, intended to open another, similar loophole that would produce equally perverse results.

It is especially improbable that Congress intended the omission of a date or time certain for the initial hearing to frustrate the stop-time rule. Congress made clear that a hearing date, once set, may be changed, 8 U.S.C. 1229(a)(2), precluding any reasonable reliance on an initial date provided. Moreover, the initial hearing date has nothing to do with the basis of the alien's removability. It concerns only the mechanics of future administrative proceedings. The hearing date is "vital" (Pet. Br. 21) only to the alien's ability to participate in those

proceedings—and Congress separately ensured that an alien who does not receive the hearing date will not be removed based on failing to appear at that hearing. 8 U.S.C. 1229a(b)(5)(A) and (C)(ii). But the course of those subsequent proceedings—including when the initial hearing is held—has no bearing on application of the stop-time rule, because the rule does not depend on what transpires in those proceedings. Whether the stop-time rule applies turns on matters as they stood when the alien was served with the notice at the beginning. See *Camarillo*, 25 I. & N. Dec. at 650.[11]

The hearing date is also immaterial to the central aim of the stop-time rule: preventing aliens who know that the government is seeking their removal to benefit from the passage of time to evade the eligibility requirements for cancellation of removal. The statute sensibly operates to terminate an alien's accrual of continuous-physical-presence time once the alien is informed that the government has formally determined to seek her removal. An alien unlawfully present who is served with a notice to appear omitting only the initial hearing date knows that the government is seeking her removal, on what basis, and the consequences of disregarding the removal proceedings. With or without a hearing date, she cannot reasonably believe thereafter that the government has acquiesced in her continued unlawful presence.

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[11] The same is true, notably, of the other event that triggers the stop-time rule: commission of certain criminal offenses. 8 U.S.C. 1229b(d)(1)(B). The alien's continuous-physical-presence period ends "when the alien has committed an offense referred to" in certain INA provisions, *ibid.*—not when the alien is convicted or charged.

b. Petitioner's attempts (Br. 38-43) to portray his contrary reading as more faithful to the statutory history and purpose are unpersuasive.

i. Petitioner contends (Br. 41) that Congress's "concern in adopting the stop-time rule was very specific": preventing aliens in already-ongoing removal proceedings from "seek[ing] to avoid, obstruct and delay those proceedings" so that they could reach the continuous-physical-presence threshold in the interim. But "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Grp.* v. *Sebben*, 488 U.S. 105, 115 (1988).

In any event, petitioner's account of Congress's concerns is incomplete. Although preventing aliens from using delay in already-commenced proceedings to acquire eligibility for discretionary relief assuredly was one abuse that concerned Congress, it was also concerned about other abuses. For example, the House Judiciary Committee expressed concern about aliens who, similar to petitioner here, "failed to appear for their deportation proceedings and were ordered deported in absentia, and then s[ought] to re-open proceedings once the requisite time has passed." House Report 122.

Moreover, petitioner's reading of the stop-time rule might encourage aliens to try to "avoid, obstruct [or] delay" removal proceedings. Pet. Br. 41. An alien served with a notice to appear that does not contain a date certain for a hearing or other ministerial details might seek to slow down the ensuing proceedings in the hope that he will not be removed before reaching the ten-year mark, and then seek cancellation of removal arguing that the notice to appear was deficient and did not stop the clock. An alien served with a notice to appear without a hearing date also might have an incentive to try to

avoid service of subsequent notices of the hearing date. See 8 U.S.C. 1229(a)(2)(A) (permitting service by mail of new hearing date only "if personal service is not practicable").

ii. Petitioner also points (Br. 38) to IIRIRA's replacement of "multiple different notices related to initiating different types of immigration hearings" with a single, unified "notice to appear" governed by new Section 1229(a). See *id.* at 38-41. That history does not help petitioner. As this Court has noted, "[f]ederal immigration law governs both the exclusion of aliens from admission to this country and the deportation of aliens previously admitted," and before IIRIRA's enactment in 1996, "these two kinds of action occurred in different procedural settings, with an alien seeking entry * * * placed in an 'exclusion proceeding' and an alien already here channeled to a 'deportation proceeding.'" *Judulang* v. *Holder*, 565 U.S. 42, 45 (2011). IIRIRA "forged [a] new," unified procedure—"removal"—that "fus[ed]" together those "two previously distinct expulsion proceedings." *Jama* v. *Immigration & Customs Enf't*, 543 U.S. 335, 349, 351 (2005); see 8 U.S.C. 1229a.

Petitioner is correct that new Section 1229(a), added by IIRIRA, prescribed the requirements for written notices that initiate the newly christened "removal proceedings." 8 U.S.C. 1229(a). But those requirements did not reflect a sea change; to the contrary, Congress largely copied over the requirements that had applied to notices that been used to commence deportation proceedings, known as "order[s] to show cause." 8 U.S.C. 1252b(a)(1) (1994). The prior regime similarly required DHS's predecessor (INS) to notify aliens of the "nature of the proceedings," the "legal authority" for them, and

"acts or conduct alleged," the "charges" and the relevant "statutory provisions," and information regarding the alien's right to be represented by counsel, his duty to apprise the government of his address and phone number, and the consequences of failing to appear or keep his contact information current. *Ibid.*; cf. 8 U.S.C. 1229(a)(1). INS also was obligated to inform the alien in writing, either "in the order to show cause or otherwise," of the hearing date and time. 8 U.S.C. 1252b(a)(2)(A) (1994). Section 1229 imposes nearly identical requirements. See 8 U.S.C. 1229(a)(1). As the committee report petitioner cites observed, new Section 1229 thus "restate[d] the provisions of [then] current subsections (a) and (b) of [Section 1252b] regarding the provision of notice ('Notice to Appear') to aliens placed in removal proceedings," while "conform[ing] [them] to the establishment of a single removal hearing to replace" exclusion and deportation. House Report 230; accord Conf. Report 211.

Petitioner seizes (Br. 38-39) on the fact that prior Section 1252b permitted INS to provide the hearing date and location either "in the order to show cause *or otherwise*," 8 U.S.C. 1252b(a)(2)(A) (1994) (emphasis added), whereas Section 1229(a) requires that the notice to appear include the hearing date. According to petitioner, Congress thus "abandoned the previous flexibility of allowing the government to use multiple notices" to convey all the required information. Pet. Br. 40. He contends (Br. 40-41) that, when Congress referred in the stop-time rule to a "notice to appear under section 1229(a)," 8 U.S.C. 1229b(d)(1), it was "aware that a 'notice to appear' must include the time and place of the hearing." That is true but beside the point. It does not follow from the fact that Congress required

notices to appear to include hearing dates that Congress therefore must have intended omission of a hearing date in a notice to appear to nullify the stop-time rule—any more than it intended the omission of any other details specified before and after IIRIRA to negate the rule.

Subsequent action by Congress confirms that it did not view the minor change in the information required to be provided in the initial notice to have any bearing on the stop-time rule. IIRIRA provided that "paragraph[] (1) * * * of [Section 1229b(d)]," *i.e.*, the stop-time rule, "shall apply to notices to appear issued before, on, or after the date of the enactment of this Act." IIRIRA § 309(c)(5), 110 Stat. 3009-627. Notices to appear as such, however, did not exist before IIRIRA and thus could not have been issued "before" IIRIRA's enactment. Soon after IIRIRA's enactment, the Board construed this effective-date provision to mean that the stop-time rule applied to orders to show cause issued before IIRIRA because "the statutory language and legislative history" show "that an 'Order to Show Cause and Notice of Hearing' and a 'notice to appear' are synonymous terms as used" in the effective-date provision. *In re N-J-B-*, 21 I. & N. Dec. 812, 818 (B.I.A. 1997). The Attorney General elected to review that ruling (vacating the Board's decision pending her review). *Id.* at 841.

While *N-J-B-* was pending before the Attorney General, Congress codified the Board's understanding. In November 1997, it amended IIRIRA's effective-date provision to state that the stop-time rule "shall apply to orders to show cause (including those referred to in [8 U.S.C. 1252b(a)(1)] * * *), issued before, on, or after the date of the enactment of" that amendment. Nicaraguan Adjustment and Central American Relief Act,

Pub. L. No. 105-100, Tit. II, sec. 203(1), § 309(c)(5)(A), 111 Stat. 2196 (8 U.S.C. 1101 note); see *Rojas-Reyes*, 235 F.3d at 120-121. Congress thus made clear that it intended the stop-time rule to apply even to orders to show cause under the pre-IIRIRA framework—which as petitioner acknowledges (Br. 39) were not required to contain hearing dates.[12] It is exceedingly improbable that Congress, having taken that affirmative step to clarify that previously issued orders that might have omitted hearing dates do trigger the stop-time rule, intended notices to appear issued in the future that omit that information *not* to trigger the rule.

iii. Petitioner further argues (Br. 36, 38) that Congress likely intended to "set a high, substantive bar on what the government must do to trigger the stop-time rule" because the rule restricts only "*eligibility* for *discretionary* relief." He notes that aliens who meet the continuous-physical-presence requirement still must meet other eligibility criteria, and even then whether to cancel removal lies in the Attorney General's discretion. *Ibid.* Petitioner argues (*ibid.*) that cancellation of removal is available only for "the most deserving immigrants," and therefore Congress must have intended a narrow, alien-friendly interpretation of the stop-time rule. That contention lacks merit. IIRIRA's history emphatically shows that Congress sought to *narrow* the availability of discretionary relief. It made the eligibility criteria more stringent and imposed an annual cap on the number of aliens to whom cancellation of removal may be granted. And it adopted the stop-time rule to prevent

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[12] The Attorney General subsequently remanded *N-J-B-* to the Board for further consideration in light of the 1997 amendment. 22 I. & N. Dec. 1057, 1057-1058 (1999).

aliens from abusing proceedings to circumvent the eligibility requirements. See pp. 37-38, *supra*.

Moreover, although the eligibility criteria are indeed demanding, petitioner's assertion that his reading safeguards the "most deserving immigrants" (Pet. Br. 36, 38) is incorrect. That might describe an alien who meets all of the eligibility criteria *and* who is determined by the Attorney General to merit one of the limited number of cancellations permitted each year. It does not describe the aliens who would benefit from petitioner's reading of the stop-time rule, who by definition did not meet even the threshold eligibility criteria at the time DHS notified them of its intent to remove them. Instead, his reading would provide a windfall to aliens, like petitioner, who knowingly entered or remained in this country unlawfully, who are personally notified that the government intends to remove them, whose removability is undisputed, and who unquestionably would *not* be eligible for relief but for the omission of a procedural detail in the notice to appear.

B. The Board's Reasonable Interpretation Of The Stop-Time Rule Is Entitled To Deference

As explained above, the INA's stop-time rule is best read to apply irrespective of whether an otherwise-valid notice to appear includes a date and time certain for a hearing. At the very least, however, the Board's interpretation is a reasonable one and therefore entitled to deference. See *Chevron*, 467 U.S. at 843-844. There is no question that *Chevron* applies to the Board's interpretation of the stop-time rule. See *Aguirre-Aguirre*, 526 U.S. at 424-425. "[J]udicial deference to the Executive Branch is especially appropriate in the immigration context," and the Board, in cases before it, possesses the Attorney General's statutory authority to

interpret and administer the INA. *Ibid.*; see 8 U.S.C. 1103(a)(1) and (g), 1229b(b)(1); 8 C.F.R. 1003.1(d)(1). The Board exercised that authority in articulating its interpretation in adjudicating *Camarillo*, *supra*, and this case, Pet. App. 18a-19a. Petitioner accordingly agreed below that the *Chevron* framework governed and that the Board's reasonable interpretation of ambiguous provisions of the statute is entitled to deference. Pet. C.A. Br. 10, 12.[13]

Under *Chevron*, an agency's interpretation of a statute it administers "governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009); see *id.* at 218 n.4 (courts need not determine "at the 'outset'" whether statute is ambiguous because "if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable"). As all but one of the circuits to consider the issue have concluded, the Board's sensible reading of the stop-time rule readily clears that bar. See Pet. App. 9a-15a; *Moscoso-Castellanos* v. *Lynch*, 803 F.3d 1079, 1083 (9th Cir. 2015); *O'Garro* v. *United States Att'y Gen.*, 605 Fed. Appx. 951, 953 (11th Cir. 2015) (per curiam); *Guaman-Yuqui* v. *Lynch*, 786 F.3d 235, 240 (2d Cir. 2015) (per curiam);

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[13] Petitioner suggests in passing (Br. 55 & n.10) that applying *Chevron* to uphold the Board's interpretation here would raise unspecified "constitutional questions." But he does not present any constitutional arguments and did not ask the Court in his petition to address those issues. Cf. Pet. 22 n.4 (noting that Court would be "free to revisit" applicability of *Chevron*). In any event, petitioner is correct (Br. 55) that "[t]he Court need not reach those questions" because the Board's reading reflects by far the better interpretation.

Gonzalez-Garcia, 770 F.3d at 434-435; *Yi Di Wang*, 759 F.3d at 675; *Urbina* v. *Holder*, 745 F.3d 736, 740 (4th Cir. 2014).[14]

1. The Board's interpretation of the stop-time rule is at a minimum reasonable

For the reasons discussed above, the Board's conclusion that omission of a date and time certain for a hearing does not nullify the stop-time rule reflects the best interpretation of the statutory text in light of its context, structure, history, and purpose. Part A, *supra*. At a minimum, it embodies "a permissible construction of the statute." *Aguirre-Aguirre*, 526 U.S. at 424 (citation omitted). Petitioner's contention that the phrase "served a notice to appear under Section 1229(a)" in Section 1229b(d)(1) is actually shorthand for "served a notice to appear that complies perfectly with Section 1229(a)(1) in all respects" is unpersuasive; but even if his reading were also reasonable, it would not follow that the Board's contrary, commonsense understanding is unreasonable.

The reasonableness of the Board's interpretation is bolstered by the practical administrative realities of removal proceedings. As the Board has explained, because DHS does not control the scheduling of initial hearings—a task assigned to the immigration court, housed in a different agency, see p. 30, *supra*—"it is often not practical to include the date and time of the initial removal hearing on the notice to appear." *Camarillo*,

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[14] The lone outlier, *Orozco-Velasquez* v. *Attorney General United States*, 817 F.3d 78 (3d Cir. 2016), reached a contrary conclusion based on its erroneous view that IIRIRA's "plain text" unambiguously precludes the Board's interpretation. *Id.* at 82-84. It did not address the ordinary meaning of "under" in this setting or most of the aspects of the statutory context, structure, history, and purpose that support the Board's reading. See Part A, *supra*.

25 I. & N. Dec. at 648. For example, when local law-enforcement authorities arrest an unlawfully present alien, DHS may have a short window to initiate removal proceedings, and it may be practically impossible to secure a hearing date from the immigration court in time to list it in the notice to appear. Cf. Pet. Br. 51. DHS cannot provide a hearing date it does not know. The governing regulations account for this reality by directing that the date, time, and place of the initial hearing shall be included in the notice to appear if it is "practicable"; if it is not practicable, then "the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien" of those details. 8 C.F.R. 1003.18(b). An alien who does not receive notice of those facts cannot be removed in absentia based on his failure to appear. 8 U.S.C. 1229a(b)(5)(A) and (C)(ii).

As Judge Sutton observed, the Board's sensible determination that omission of the hearing date and time does not negate the stop-time rule thus "respects the setting in which the[] requirements" to provide those details "appear," where the tasks of prosecuting cases and scheduling hearings have long been allocated to separate agencies. *Gonzalez-Garcia*, 770 F.3d at 434. There is no indication that Congress intended in IIRIRA to upend that settled allocation of authority. And "there is no reason to conclude that Congress would have expected that scheduling delays in the Immigration Court resulting from pending caseloads or other administrative issues would affect when an alien's continuous residence or physical presence ends for purposes of eligibility for relief from removal." *Camarillo*, 25 I. & N. Dec. at 650. It is also reasonable to conclude that Congress preferred DHS's procedure of apprising aliens candidly that the

hearing date is forthcoming to the alternative, which "would require [DHS] investigators to place hearing dates on all notices to appear whether the [immigration court] was prepared to schedule them or not" and then provide the actual hearing date in a further notice. *Gonzalez-Garcia*, 770 F.3d at 434-435.[15]

2. Petitioner's contrary arguments lack merit

Apart from reprising his arguments in support of his contrary reading (Br. 48-49), petitioner advances two other reasons not to sustain the Board's interpretation under *Chevron*. Neither has merit.

a. Petitioner contends that this Court's decisions require resolving "any lingering ambiguities in deportation statutes in favor of the alien." Pet. Br. 44 (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001)); see *id.* at 44-48. That is incorrect. This Court has repeatedly applied the *Chevron* framework to sustain the Board's interpretation of ambiguous INA provisions, including provisions addressing relief from removal. See, *e.g.*, *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 591-598 (2012); *Aguirre-Aguirre*, 526 U.S. at 424-432. See also *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203-2213 (2014) (plurality opinion); *id.* at 2215-2216 (Roberts, C.J., joined by Scalia, J., concurring in the judgment). Those decisions resolving ambiguities by according def-

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[15] As petitioner's amici note, a scheduling system previously enabled DHS and the immigration court to coordinate in setting hearing dates in some cases, but that system has not been active for several years. NIJC Br. 30-32; see also Schmidt Br. 6-7. There is no reason to believe that Congress in 1996 intended the stop-time rule's application to depend on the existence or feasibility *vel non* of such a system and to make a given alien's eligibility for discretionary relief hinge on the availability of such a system in his case.

erence to the agency's position refute petitioner's suggestion that any uncertainty must be resolved in the alien's favor. If petitioner's view were correct, those and other cases applying *Chevron* in this setting would be wrong.

Moreover, petitioner identifies no case in which that interpretive tool of last resort was dispositive in rejecting an agency's construction under *Chevron*. For example, in *St. Cyr*, on which petitioner heavily relies (Br. 44-47), the Court's analysis rested on the presumption against retroactivity; the Court explained that deference was unwarranted because *that* presumption left "no ambiguity" in the statute. 533 U.S. at 321 n.45; see *id.* at 315-320. The Court remarked in a single sentence that its conclusion was "buttressed" by the tiebreaking rule petitioner invokes. *Id.* at 320. Petitioner's other principal authority, *INS* v. *Errico*, 385 U.S. 214 (1966), predated *Chevron* by nearly two decades and had no occasion to address whether petitioner's principle would trump deference to an agency's reasonable reading. And the Court invoked that principle only in the alternative, after having already concluded that other considerations made the statute's meaning clear. See *id.* at 225 ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien.").

b. Petitioner also asserts (Br. 52-55) that the Board's reading of the stop-time rule is inconsistent with its conclusion in *Ordaz*, *supra*, that the stop-time rule is not triggered by a notice to appear that is never filed to commence a proceeding. Any alleged inconsistency is irrelevant. The question *Ordaz* addressed is not before the Court; if the Court's decision here has implications

for that separate question, the Board can revisit its answer to that question as appropriate.

In any event, as the Board explained in *Ordaz*, the question there was "related, but different," and the Board's analysis of both is "consistent." 26 I. & N. Dec. at 641. *Ordaz* addressed whether "served *a* notice to appear" in Section 1229b(d)(1) means a notice later filed to commence the proceedings at issue, or "*any* notice to appear," including one never filed. *Id.* at 638-639 (citation omitted; first emphasis added). The Board determined that the language alone was ambiguous but that in context the former reading better captured Congress's likely intent. *Id.* at 638-643. As it explained, "[a]ffording 'stop-time' effect to 'any' notice to appear, regardless of whether proceedings were ever commenced on that basis, would potentially render an alien ineligible for relief on the basis of a charging document that was invalid or otherwise insufficient to support a removal charge as issued." *Id.* at 640. Moreover, "if proceedings were never commenced, the alien would not have the opportunity to contest, or require the DHS to prove, the allegations and charges contained in the notice to appear." *Ibid.* Indeed, even if an alien served with an invalid notice to appear had "successfully defended against" it, the notice still could trigger the stop-time rule "in later proceedings." *Ibid.*

That reasoning and result are consistent with the Board's determination that a notice to appear that omits a hearing date still triggers the stop-time rule. Informing an alien that the hearing date will be supplied later leads to none of the concerns *Ordaz* addressed. The alien ultimately must be provided a hearing date (and other required information); otherwise, he cannot be removed in absentia based on those charges. 8 U.S.C.

1229a(b)(5)(A) and (C)(ii). He thus will have an opportunity to defend against the charges of removability in the notice. And if those charges are insufficient to support removal, he will not be removed based upon them.

Indeed, *Ordaz* mitigates some of the very concerns petitioner raises here. Because only a notice to appear that is actually filed to commence proceedings triggers the stop-time rule, DHS has no reason to serve notices to appear omitting all of the information Section 1229(a) specifies; a notice that omits, for example, the grounds of removability cannot commence a proceeding and thus will not trigger the stop-time rule. See p. 36, *supra*. The Board has reasonably construed the statute to avoid precisely those problems.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JONATHAN C. BOND
Assistant to the Solicitor General
DONALD E. KEENER
JOHN W. BLAKELEY
PATRICK J. GLEN
Attorneys

MARCH 2018

APPENDIX

1. 8 U.S.C. 1103 provides in pertinent part:

Powers and duties of the Secretary, the Under Secretary, and the Attorney General

(a) Secretary of Homeland Security

(1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

* * * * *

(g) Attorney General

(1) In general

The Attorney General shall have such authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.

(2) Powers

The Attorney General shall establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.

2. 8 U.S.C. 1227 provides:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status

(A) Inadmissible aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

(B) Present in violation of law

Any alien who is present in the United States in violation of this chapter or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been

revoked under section 1201(i) of this title, is deportable.

(C) Violated nonimmigrant status or condition of entry

(i) Nonimmigrant status violators

Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status, is deportable.

(ii) Violators of conditions of entry

Any alien whom the Secretary of Health and Human Services certifies has failed to comply with terms, conditions, and controls that were imposed under section 1182(g) of this title is deportable.

(D) Termination of conditional permanent residence

(i) In general

Any alien with permanent resident status on a conditional basis under section 1186a of this title (relating to conditional permanent resident status for certain alien spouses and sons and daughters) or under section 1186b of this title (relating to conditional permanent resident status for certain alien entrepreneurs, spouses, and children) who has had such status terminated under such respective section is deportable.

(ii) Exception

Clause (i) shall not apply in the cases described in section 1186a(c)(4) of this title (relating to certain hardship waivers).

(E) Smuggling

(i) In general

Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized

The Attorney General may, in his discretion for humanitarian purposes, to assure family

unity, or when it is otherwise in the public interest, waive application of clause (i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(F) Repealed. Pub. L. 104-208, div. C, title VI, § 671(d)(1)(C), Sept. 30, 1996, 110 Stat. 3009-723

(G) Marriage fraud

An alien shall be considered to be deportable as having procured a visa or other documentation by fraud (within the meaning of section 1182(a)(6)(C)(i) of this title) and to be in the United States in violation of this chapter (within the meaning of subparagraph (B)) if—

(i) the alien obtains any admission into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such admission of the alien and which, within 2 years subsequent to any admission of the alien in the United States, shall be judicially annulled or terminated, unless the alien establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws, or

(ii) it appears to the satisfaction of the Attorney General that the alien has failed or

refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant.

(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 1182(a)(6)(C)(i) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who—

(i)(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title which were a direct result of that fraud or misrepresentation.

(ii) is a VAWA self-petitioner.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, pos-

sessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate—

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18 for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title,

is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or

persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) Trafficking

Any alien described in section 1182(a)(2)(H) of this title is deportable.

(3) Failure to register and falsification of documents

(A) Change of address

An alien who has failed to comply with the provisions of section 1305 of this title is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(B) Failure to register or falsification of documents

Any alien who at any time has been convicted—

(i) under section 1306(c) of this title or under section 36(c) of the Alien Registration Act, 1940,

(ii) of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.), or

(iii) of a violation of, or an attempt or a conspiracy to violate, section 1546 of title 18 (relating to fraud and misuse of visas, permits, and other entry documents),

is deportable.

(C) Document fraud

(i) In general

An alien who is the subject of a final order for violation of section 1324c of this title is deportable.

(ii) Waiver authorized

The Attorney General may waive clause (i) in the case of an alien lawfully admitted for permanent residence if no previous civil money penalty was imposed against the alien under section 1324c of this title and the offense was incurred solely to assist, aid, or support the alien's spouse or child (and no other individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause.

(D) Falsely claiming citizenship

(i) In general

Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any Federal or State law is deportable.

(ii) Exception

In the case of an alien making a representation described in clause (i), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such representation.

(4) Security and related grounds

(A) In general

Any alien who has engaged, is engaged, or at any time after admission engages in—

(i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other criminal activity which endangers public safety or national security, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is deportable.

(B) Terrorist activities

Any alien who is described in subparagraph (B) or (F) of section 1182(a)(3) of this title is deportable.

(C) Foreign policy

(i) In general

An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.

(ii) Exceptions

The exceptions described in clauses (ii) and (iii) of section 1182(a)(3)(C) of this title shall apply to deportability under clause (i) in the same manner as they apply to inadmissibility under section 1182(a)(3)(C)(i) of this title.

(D) Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

Any alien described in clause (i), (ii), or (iii) of section 1182(a)(3)(E) of this title is deportable.

(E) Participated in the commission of severe violations of religious freedom

Any alien described in section 1182(a)(2)(G) of this title is deportable.

(F) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18 is deportable.

(5) Public charge

Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.

(6) Unlawful voters

(A) In general

Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable.

(B) Exception

In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such violation.

(7) Waiver for victims of domestic violence

(A) In general

The Attorney General is not limited by the criminal court record and may waive the application of paragraph (2)(E)(i) (with respect to crimes of domestic violence and crimes of stalking) and

(ii) in the case of an alien who has been battered or subjected to extreme cruelty and who is not and was not the primary perpetrator of violence in the relationship—

(i)[1] upon a determination that—

(I) the alien was acting is[2] self-defense;

(II) the alien was found to have violated a protection order intended to protect the alien; or

(III) the alien committed, was arrested for, was convicted of, or pled guilty to committing a crime—

(aa) that did not result in serious bodily injury; and

(bb) where there was a connection between the crime and the alien's having been battered or subjected to extreme cruelty.

(B) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

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[1] So in original. No cl. (ii) has been enacted.

[2] So in original. Probably should be "in".

(b) Deportation of certain nonimmigrants

An alien, admitted as a nonimmigrant under the provisions of either section 1101(a)(15)(A)(i) or 1101(a)(15)(G)(i) of this title, and who fails to maintain a status under either of those provisions, shall not be required to depart from the United States without the approval of the Secretary of State, unless such alien is subject to deportation under paragraph (4) of subsection (a) of this section.

(c) Waiver of grounds for deportation

Paragraphs (1)(A), (1)(B), (1)(C), (1)(D), and (3)(A) of subsection (a) of this section (other than so much of paragraph (1) as relates to a ground of inadmissibility described in paragraph (2) or (3) of section 1182(a) of this title) shall not apply to a special immigrant described in section 1101(a)(27)(J) of this title based upon circumstances that existed before the date the alien was provided such special immigrant status.

(d) Administrative stay

(1) If the Secretary of Homeland Security determines that an application for nonimmigrant status under subparagraph (T) or (U) of section 1101(a)(15) of this title filed for an alien in the United States sets forth a prima facie case for approval, the Secretary may grant the alien an administrative stay of a final order of removal under section 1231(c)(2) of this title until—

(A) the application for nonimmigrant status under such subparagraph (T) or (U) is approved; or

(B) there is a final administrative denial of the application for such nonimmigrant status after the exhaustion of administrative appeals.

(2) The denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for a stay of removal, deferred action, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws of the United States.

(3) During any period in which the administrative stay of removal is in effect, the alien shall not be removed.

(4) Nothing in this subsection may be construed to limit the authority of the Secretary of Homeland Security or the Attorney General to grant a stay of removal or deportation in any case not described in this subsection.

3. 8 U.S.C. 1229 provides:

Initiation of removal proceedings

(a) Notice to appear

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) of this section and (ii) a current list of counsel prepared under subsection (b)(2) of this section.

(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)(i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings,

subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying—

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

(3) Central address files

The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

(b) Securing of counsel

(1) In general

In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

(2) Current lists of counsel

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1229a of this title. Such lists shall be provided under subsection (a)(1)(E) of this section and otherwise made generally available.

(3) Rule of construction

Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

(c) Service by mail

Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F) of this section.

(d) Prompt initiation of removal

(1) In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction.

(2) Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(e) Certification of compliance with restrictions on disclosure

(1) In general

In cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 1367 of this title have been complied with.

(2) Locations

The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization.

(B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of section 1101(a)(15) of this title.

4. 8 U.S.C. 1229a provides:

Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations

prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general

The proceeding may take place—

(i) in person,

(ii) where agreed to by the parties, in the absence of the alien,

(iii) through video conference, or

(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General—

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2) of this section). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the

reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior

The Attorney General shall, by regulation—

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or

(2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1) of this section) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof

(1) Decision

(A) In general

At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

(B) Certain medical decisions

If a medical officer or civil surgeon or board of medical officers has certified under section 1222(b) of this title that an alien has a disease, illness, or addiction which would make the alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien

In the proceeding the alien has the burden of establishing—

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is—

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant

or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or

any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(5) Notice

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation

shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections[1] 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) of this

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[1] So in original.

section is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply—

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,,[1] section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

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[1] So in original.

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title[2] pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

(d) Stipulated removal

The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

(e) Definitions

In this section and section 1229b of this title:

(1) Exceptional circumstances

The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

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[2] So in original. A closing parenthesis probably should appear.

(2) Removable

The term "removable" means—

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

5. 8 U.S.C. 1229b provides:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for

permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) Special rule for battered spouse or child

(A) Authority

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that—

(i)(I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent); or

(III) the alien has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the alien intended to marry, but whose marriage is not legitimate because of that United States citizen's or lawful permanent resident's bigamy;

(ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application, and the issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States;

(iii) the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C);

(iv) the alien is not inadmissible under paragraph (2) or (3) of section 1182(a) of this title, is not deportable under paragraphs (1)(G) or (2) through (4) of section 1227(a) of this title, subject to paragraph (5), and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

(B) Physical presence

Notwithstanding subsection (d)(2) of this section, for purposes of subparagraph (A)(ii) or for purposes of section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the alien demonstrates a connection between the absence and the battering or extreme cruelty perpetrated against the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2) of this section. If any absence or aggregate absences exceed 180 days, the absences or portions of the absences will not be considered to break the period of continuous presence. Any such period of time excluded from the 180-day limit shall be excluded in computing the time during which the alien has been physically present for purposes of the 3-year requirement set forth in this subparagraph, subparagraph (A)(ii), and section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(C) Good moral character

Notwithstanding section 1101(f) of this title, an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of subparagraph (A)(iv) shall not bar the

Attorney General from finding the alien to be of good moral character under subparagraph (A)(iii) or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.

(D) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

(3) Recordation of date

With respect to aliens who the Attorney General adjusts to the status of an alien lawfully admitted for permanent residence under paragraph (1) or (2), the Attorney General shall record the alien's lawful admission for permanent residence as of the date of the Attorney General's cancellation of removal under paragraph (1) or (2).

(4) Children of battered aliens and parents of battered alien children

(A) In general

The Attorney General shall grant parole under section 1182(d)(5) of this title to any alien who is a—

(i) child of an alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); or

(ii) parent of a child alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(B) Duration of parole

The grant of parole shall extend from the time of the grant of relief under subsection (b)(2) of this section or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to the time the application for adjustment of status filed by aliens covered under this paragraph has been finally adjudicated. Applications for adjustment of status filed by aliens covered under this paragraph shall be treated as if the applicants were VAWA self-petitioners. Failure by the alien granted relief under subsection (b)(2) of this section or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) may result in revocation of parole.

(5) Application of domestic violence waiver authority

The authority provided under section 1227(a)(7) of this title may apply under paragraphs (1)(B), (1)(C), and (2)(A)(iv) in a cancellation of removal and adjustment of status proceeding.

(6) Relatives of trafficking victims

(A) In general

Upon written request by a law enforcement official, the Secretary of Homeland Security may parole under section 1182(d)(5) of this title any alien who is a relative of an alien granted continued presence under section 7105(c)(3)(A) of title 22, if the relative—

(i) was, on the date on which law enforcement applied for such continued presence—

(I) in the case of an alien granted continued presence who is under 21 years of age, the spouse, child, parent. or unmarried sibling under 18 years of age, of the alien; or

(II) in the case of an alien granted continued presence who is 21 years of age or older, the spouse or child of the alien; or

(ii) is a parent or sibling of the alien who the requesting law enforcement official, in consultation with the Secretary of Homeland Security, as appropriate, determines to be in present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement, irrespective of age.

(B) Duration of parole

(i) In general

The Secretary may extend the parole granted under subparagraph (A) until the final adjudication of the application filed by the principal alien under section 1101(a)(15)(T)(ii) of this title.

(ii) Other limits on duration

If an application described in clause (i) is not filed, the parole granted under subparagraph (A) may extend until the later of—

(I) the date on which the principal alien's authority to remain in the United States under section 7105(c)(3)(A) of title 22 is terminated; or

(II) the date on which a civil action filed by the principal alien under section 1595 of title 18 is concluded.

(iii) Due diligence

Failure by the principal alien to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) of subparagraph (A), or in pursuing the civil action described in clause (ii)(II) (as determined by the Secretary of Homeland Security in consultation with the Attorney General), may result in revocation of parole.

(C) Other limitations

A relative may not be granted parole under this paragraph if—

(i) the Secretary of Homeland Security or the Attorney General has reason to believe that the relative was knowingly complicit in the trafficking of an alien permitted to remain in the United States under section 7105(c)(3)(A) of title 22; or

(ii) the relative is an alien described in paragraph (2) or (3) of section 1182(a) of this title or paragraph (2) or (4) of section 1227(a) of this title.

(c) Aliens ineligible for relief

The provisions of subsections (a) and (b)(1) of this section shall not apply to any of the following aliens:

(1) An alien who entered the United States as a crewman subsequent to June 30, 1964.

(2) An alien who was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title, or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 1182(e) of this title.

(3) An alien who—

(A) was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training,

(B) is subject to the two-year foreign residence requirement of section 1182(e) of this title, and

(C) has not fulfilled that requirement or received a waiver thereof.

(4) An alien who is inadmissible under section 1182(a)(3) of this title or deportable under section 1227(a)(4) of this title.

(5) An alien who is described in section 1231(b)(3)(B)(i) of this title.

(6) An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 1254(a) of this title or who has been granted relief under section 1182(c) of this title, as such sections were in effect before September 30, 1996.

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2) of this section, when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

(2) Treatment of certain breaks in presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) of this section if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(3) Continuity not required because of honorable service in Armed Forces and presence upon entry into service

The requirements of continuous residence or continuous physical presence in the United States under subsections (a) and (b) of this section shall not apply to an alien who—

(A) has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and

(B) at the time of the alien's enlistment or induction was in the United States.

(c) Annual limitation

(1) Aggregate limitation

Subject to paragraphs (2) and (3), the Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 1254(a) of this title (as in effect before September 30, 1996), of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such cancellation and adjustment,

or such suspension and adjustment, and whether such an alien had previously applied for suspension of deportation under such section 1254(a) of this title. The numerical limitation under this paragraph shall apply to the aggregate number of decisions in any fiscal year to cancel the removal (and adjust the status) of an alien, or suspend the deportation (and adjust the status) of an alien, under this section or such section 1254(a) of this title.

(2) Fiscal year 1997

For fiscal year 1997, paragraph (1) shall only apply to decisions to cancel the removal of an alien, or suspend the deportation of an alien, made after April 1, 1997. Notwithstanding any other provision of law, the Attorney General may cancel the removal or suspend the deportation, in addition to the normal allotment for fiscal year 1998, of a number of aliens equal to 4,000 less the number of such cancellations of removal and suspensions of deportation granted in fiscal year 1997 after April 1, 1997.

(3) Exception for certain aliens

Paragraph (1) shall not apply to the following:

(A) Aliens described in section 309(c)(5)(C)(i) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (as amended by the Nicaraguan Adjustment and Central American Relief Act).

(B) Aliens in deportation proceedings prior to April 1, 1997, who applied for suspension of deportation under section 1254(a)(3) of this title (as in effect before September 30, 1996).

6. 8 U.S.C. 1229c provides:

Voluntary departure

(a) Certain conditions

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title.

(2) Period

(A) In general

Subject to subparagraph (B), permission to depart voluntarily under this subsection shall not be valid for a period exceeding 120 days.

(B) Three-year pilot program waiver

During the period October 1, 2000, through September 30, 2003, and subject to subparagraphs (C) and (D)(ii), the Attorney General may, in the discretion of the Attorney General for humanitarian purposes, waive application of subparagraph (A) in the case of an alien—

(i) who was admitted to the United States as a nonimmigrant visitor (described in section 1101(a)(15)(B) of this title) under the provisions of the visa waiver pilot program established pursuant to section 1187 of this title, seeks the waiver for the purpose of continuing to receive medical treatment in the United States from a

physician associated with a health care facility, and submits to the Attorney General—

(I) a detailed diagnosis statement from the physician, which includes the treatment being sought and the expected time period the alien will be required to remain in the United States;

(II) a statement from the health care facility containing an assurance that the alien's treatment is not being paid through any Federal or State public health assistance, that the alien's account has no outstanding balance, and that such facility will notify the Service when the alien is released or treatment is terminated; and

(III) evidence of financial ability to support the alien's day-to-day expenses while in the United States (including the expenses of any family member described in clause (ii)) and evidence that any such alien or family member is not receiving any form of public assistance; or

(ii) who—

(I) is a spouse, parent, brother, sister, son, daughter, or other family member of a principal alien described in clause (i); and

(II) entered the United States accompanying, and with the same status as, such principal alien.

(C) Waiver limitations

(i) Waivers under subparagraph (B) may be granted only upon a request submitted by a Service district office to Service headquarters.

(ii) Not more than 300 waivers may be granted for any fiscal year for a principal alien under subparagraph (B)(i).

(iii)(I) Except as provided in subclause (II), in the case of each principal alien described in subparagraph (B)(i) not more than one adult may be granted a waiver under subparagraph (B)(ii).

(II) Not more than two adults may be granted a waiver under subparagraph (B)(ii) in a case in which—

(aa) the principal alien described in subparagraph (B)(i) is a dependent under the age of 18; or

(bb) one such adult is age 55 or older or is physically handicapped.

(D) Report to Congress; suspension of waiver authority

(i) Not later than March 30 of each year, the Commissioner shall submit to the Congress an annual report regarding all waivers granted under subparagraph (B) during the preceding fiscal year.

(ii) Notwithstanding any other provision of law, the authority of the Attorney General under subparagraph (B) shall be suspended during any

period in which an annual report under clause (i) is past due and has not been submitted.

(3) Bond

The Attorney General may require an alien permitted to depart voluntarily under this subsection to post a voluntary departure bond, to be surrendered upon proof that the alien has departed the United States within the time specified.

(4) Treatment of aliens arriving in the United States

In the case of an alien who is arriving in the United States and with respect to whom proceedings under section 1229a of this title are (or would otherwise be) initiated at the time of such alien's arrival, paragraph (1) shall not apply. Nothing in this paragraph shall be construed as preventing such an alien from withdrawing the application for admission in accordance with section 1225(a)(4) of this title.

(b) At conclusion of proceedings

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that—

(A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a) of this title;

(B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;

(C) the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4) of this title; and

(D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

(2) Period

Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days.

(3) Bond

An alien permitted to depart voluntarily under this subsection shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien will depart, to be surrendered upon proof that the alien has departed the United States within the time specified.

(c) Aliens not eligible

The Attorney General shall not permit an alien to depart voluntarily under this section if the alien was previously permitted to so depart after having been found inadmissible under section 1182(a)(6)(A) of this title.

(d) Civil penalty for failure to depart

(1) In general

Subject to paragraph (2), if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United States within the time period specified, the alien—

(A) shall be subject to a civil penalty of not less than $1,000 and not more than $5,000; and

(B) shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title.

(2) Application of VAWA protections

The restrictions on relief under paragraph (1) shall not apply to relief under section 1229b or 1255 of this title on the basis of a petition filed by a VAWA self-petitioner, or a petition filed under section 1229b(b)(2) of this title, or under section 1254(a)(3) of this title (as in effect prior to March 31, 1997), if the extreme cruelty or battery was at least one central reason for the alien's overstaying the grant of voluntary departure.

(3) Notice of penalties

The order permitting an alien to depart voluntarily shall inform the alien of the penalties under this subsection.

(e) Additional conditions

The Attorney General may by regulation limit eligibility for voluntary departure under this section for any class or classes of aliens. No court may review any regulation issued under this subsection.

(f) Judicial review

No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure under subsection (b) of this section, nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure.

7. 8 U.S.C. 1252b (1994) provides:

Deportation procedures

(a) Notices

(1) Order to show cause

In deportation proceedings under section 1252 of this title, written notice (in this section referred to as an "order to show cause") shall be given in person to the alien (or, if personal service is not practicable, such notice shall be given by certified mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided a list of counsel prepared under subsection (b)(2) of this section.

(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1252 of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under subsection (c)(2) of this section of failure to provide address and telephone information pursuant to this subparagraph.

(2) Notice of time and place of proceedings

In deportation proceedings under section 1252 of this title—

(A) written notice shall be given in person to the alien (or, if personal service is not practicable, written notice shall be given by certified mail to the alien or to the alien's counsel of record, if any), in the order to show cause or otherwise, of—

(i) the time and place at which the proceedings will be held, and

(ii) the consequences under subsection (c) of this section of the failure, except under exceptional circumstances, to appear at such proceedings; and

(B) in the case of any change or postponement in the time and place of such proceedings, written notice shall be given in person to the alien (or, if personal service is not practicable, written notice

shall be given by certified mail to the alien or to the alien's counsel of record, if any) of—

(i) the new time or place of the proceedings, and

(ii) the consequences under subsection (c) of this section of failing, except under exceptional circumstances, to attend such proceedings.

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under subsection (a)(1)(F) of this section.

(3) Form of information

Each order to show cause or other notice under this subsection—

(A) shall be in English and Spanish, and

(B) shall specify that the alien may be represented by an attorney in deportation proceedings under section 1252 of this title and will be provided, in accordance with subsection (b)(1) of this section, a period of time in order to obtain counsel and a current list described in subsection (b)(2) of this section.

(4) Central address files

The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

(b) Securing of counsel

(1) In general

In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1252 of this title, the hearing date shall not be scheduled earlier than 14 days after the service of the order to show cause, unless the alien requests in writing an earlier hearing date.

(2) Current lists of counsel

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1252 of this title. Such lists shall be provided under subsection (a)(1)(E) of this section and otherwise made generally available.

(c) Consequences of failure to appear

(1) In general

Any alien who, after written notice required under subsection (a)(2) of this section has been provided to the alien or the alien's counsel of record, does not attend a proceeding under section 1252 of this title, shall be ordered deported under section 1252(b)(1) of this title in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is deportable. The written notice by the Attorney General shall be considered sufficient for purposes of this paragraph if provided at the most recent address provided under subsection (a)(1)(F) of this section.

(2) No notice if failure to provide address information

No written notice shall be required under paragraph (1) if the alien has failed to provide the address required under subsection (a)(1)(F) of this section.

(3) Rescission of order

Such an order may be rescinded only—

(A) upon a motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (f)(2) of this section), or

(B) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with subsection (a)(2) of this section or the alien demonstrates that the alien was in Federal or State custody and did not appear through no fault of the alien.

The filing of the motion to reopen described in subparagraph (A) or (B) shall stay the deportation of the alien pending disposition of the motion.

(4) Effect on judicial review

Any petition for review under section 1105a of this title of an order entered in absentia under this subsection shall, notwithstanding such section, be filed not later than 60 days (or 30 days in the case of an alien convicted of an aggravated felony) after the date of the final order of deportation and shall (except in cases described in section 1105a(a)(5) of this title) be confined to the issues of the validity of the notice provided to the alien, to the reasons for the alien's not attending the proceeding, and to whether or not

clear, convincing, and unequivocal evidence of deportability has been established.

(d) Treatment of frivolous behavior

The Attorney General shall, by regulation—

(1) define in a proceeding before a special inquiry officer or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(2) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(3) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this subsection shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(e) Limitation on discretionary relief for failure to appear

(1) At deportation proceedings

Any alien against whom a final order of deportation is entered in absentia under this section and who, at the time of the notice described in subsection (a)(2) of this section, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (f)(2) of this section) to attend a proceeding under section 1252 of

this title, shall not be eligible for relief described in paragraph (5) for a period of 5 years after the date of the entry of the final order of deportation.

(2) Voluntary departure

(A) In general

Subject to subparagraph (B), any alien allowed to depart voluntarily under section 1254(e)(1) of this title or who has agreed to depart voluntarily at his own expense under section 1252(b)(1) of this title who remains in the United States after the scheduled date of departure, other than because of exceptional circumstances, shall not be eligible for relief described in paragraph (5) for a period of 5 years after the scheduled date of departure or the date of unlawful reentry, respectively.

(B) Written and oral notice required

Subparagraph (A) shall not apply to an alien allowed to depart voluntarily unless, before such departure, the Attorney General has provided written notice to the alien in English and Spanish and oral notice either in the alien's native language or in another language the alien understands of the consequences under subparagraph (A) of the alien's remaining in the United States after the scheduled date of departure, other than because of exceptional circumstances.

(3) Failure to appear under deportation order

(A) In general

Subject to subparagraph (B), any alien against whom a final order of deportation is entered under this section and who fails, other than because of

exceptional circumstances, to appear for deportation at the time and place ordered shall not be eligible for relief described in paragraph (5) for a period of 5 years after the date the alien was required to appear for deportation.

(B) Written and oral notice required

Subparagraph (A) shall not apply to an alien against whom a deportation order is entered unless the Attorney General has provided, orally in the alien's native language or in another language the alien understands and in the final order of deportation under this section of the consequences under subparagraph (A) of the alien's failure, other than because of exceptional circumstances, to appear for deportation at the time and place ordered.

(4) Failure to appear for asylum hearing

(A) In general

Subject to subparagraph (B), any alien–

(i) whose period of authorized stay (if any) has expired through the passage of time,

(ii) who has filed an application for asylum, and

(iii) who fails, other than because of exceptional circumstances, to appear at the time and place specified for the asylum hearing,

shall not be eligible for relief described in paragraph (5) for a period of 5 years after the date of the asylum hearing.

(B) Written and oral notice required

Subparagraph (A) shall not apply in the case of an alien with respect to a failure to be present at a hearing unless—

(i) written notice in English and Spanish, and oral notice either in the alien's native language or in another language the alien understands, was provided to the alien of the time and place at which the asylum hearing will be held, and in the case of any change or postponement in such time or place, written notice in English and Spanish, and oral notice either in the alien's native language or in another language the alien understands, was provided to the alien of the new time or place of the hearing; and

(ii) notices under clause (i) specified the consequences under subparagraph (A) of failing, other than because of exceptional circumstances, to attend such hearing.

(5) Relief covered

The relief described in this paragraph is—

(A) voluntary departure under section 1252(b)(1) of this title,

(B) suspension of deportation or voluntary departure under section 1254 of this title, and

(C) adjustment or change of status under section 1255, 1258, or 1259 of this title.

(f) Definitions

In this section:

(1) The term "certified mail" means certified mail, return receipt requested.

(2) The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien.

8. 8 U.S.C. 1254 (1994) provides:

Suspension of deportation

(a) Adjustment of status for permanent residence; contents

As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 1251(a)(4)(D) of this title) who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship

to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;

(2) is deportable under paragraph (2), (3), or (4) of section 1251(a) of this title; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(3) is deportable under any law of the United States except section 1251(a)(1)(G) of this title and the provisions specified in paragraph (2); has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application; has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent); and proves that during all of such time in the United States the alien was and is a person of good moral character; and is a person whose deportation would, in the opinion of the

Attorney General, result in extreme hardship to the alien or the alien's parent or child.

(b) Continuous physical presence: inapplicability based on service in Armed Forces; brief, casual, and innocent absences

(1) The requirement of continuous physical presence in the United States specified in paragraphs (1) and (2) of subsection (a) of this section shall not be applicable to an alien who (A) has served for a minimum period of twenty-four months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and (B) at the time of his enlistment or induction was in the United States.

(2) An alien shall not be considered to have failed to maintain continuous physical presence in the United States under paragraphs (1) and (2) of subsection (a) of this section if the absence from the United States was brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence.

(c) Fulfillment of requirements of subsection (a)

Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien.

(d) Record of cancellation of deportation

Upon the cancellation of deportation in the case of any alien under this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the cancellation of deportation of such alien is made.

(e) Voluntary departure

(1) Except as provided in paragraph (2), the Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (2), (3), or (4) of section 1251(a) of this title (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

(2) The authority contained in paragraph (1) shall not apply to any alien who is deportable because of a conviction for an aggravated felony.

(f) Alien crewmen; nonimmigrant exchange aliens admitted to receive graduate medical education or training; other

The provisions of subsection (a) of this section shall not apply to an alien who—

(1) entered the United States as a crewman subsequent to June 30, 1964;

(2) was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title, or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 1182(e) of this title; or

(3)(A) was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training, (B) is subject to the two-year foreign residence requirement of section 1182(e) of this title, and (C) has not fulfilled that requirement or received a waiver thereof.

(g) Consideration of evidence

In acting on applications under subsection (a)(3) of this section, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

9. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. III, Subtit. A, § 309(c)(5), 110 Stat. 3009-627, provides:

SEC. 309. EFFECTIVE DATES; TRANSITION.

* * * * *

(c) TRANSITION FOR ALIENS IN PROCEEDINGS.—

* * * * *

(5) TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.—Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality

Act (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after the date of the enactment of this Act.

10. Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, Tit. II, sec. 203(1), § 309(c)(5)(A), 111 Stat. 2196 (8 U.S.C. 1101 note), provides:

Sec. 203. MODIFICATION OF CERTAIN TRANSITION RULES. (a) TRANSITIONAL RULES WITH REGARD TO SUSPENSION OF DEPORTATION.—

(1) IN GENERAL.—Section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208; division C; 110 Stat. 3009 627) is amended to read as follows:

"(5) TRANSITIONAL RULES WITH REGARD TO SUSPENSION OF DEPORTATION.—

"(A) IN GENERAL.—Subject to subparagraphs (B) and (C), paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to orders to show cause (including those referred to in section 242B(a)(1) of the Immigration and Nationality Act, as in effect before the title III-A effective date), issued before, on, or after the date of the enactment of this Act.

11. 8 C.F.R. 242.1 (1995) provides:

Order to show cause and notice of hearing.

(a) *Commencement.* Every proceeding to determine the deportability of an alien in the United States is commenced by the filing of an Order to Show Cause with the Office of the Immigration Judge, except an alien who has been admitted to the United States under the provisions of section 217 of the Act and part 217 of this chapter other than such an alien who as applied for asylum in the United States. In the proceeding, the alien shall be known as the respondent. Orders to show cause may be issued by:

(1) District directors;

(2) Acting district directors;

(3) Deputy district directors;

(4) Assistant district directors for investigations;

(5) Deputy assistant district directors for investigations;

(6) Assistant district directors for deportation;

(7) Deputy assistant district directors for deportation;

(8) Assistant district directors for examinations;

(9) Deputy assistant district directors for examinations;

(10) Assistant district directors for anti-smuggling;

(11) Officers in charge (except foreign);

(12) Chief patrol agents;

(13) Deputy chief patrol agents;

(14) Associate chief patrol agents;

(15) Assistant chief patrol agents;

(16) The Assistant Commissioner, Investigations;

(17) Service center directors;

(18) Director, Organized Crime Drug Enforcement Task Force (OCDETF);

(19) Assistant Director, Organized Crime Drug Enforcement Task Force (OCDETF), (New York, NY; Houston, TX; Los Angeles, CA; and Miami, FL);

(20) The Assistant Commissioner, Refugees, Asylum and Parole;

(21) Supervisory asylum officers.

12. 8 C.F.R. 1003.1 provides:

Organization, jurisdiction, and powers of the Board of Immigration Appeals.

(a)(1) *Organization.* There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review (EOIR). The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them. The Board shall consist of 17 members. A vacancy, or the absence or unavailability of a Board member, shall not impair the right of the remaining members to exercise all the powers of the Board.

(2) *Chairman.* The Attorney General shall designate one of the Board members to serve as Chairman.

The Attorney General may designate one or two Vice Chairmen to assist the Chairman in the performance of his duties and to exercise all of the powers and duties of the Chairman in the absence or unavailability of the Chairman.

(i) The Chairman, subject to the supervision of the Director, shall direct, supervise, and establish internal operating procedures and policies of the Board. The Chairman shall have authority to:

(A) Issue operational instructions and policy, including procedural instructions regarding the implementation of new statutory or regulatory authorities;

(B) Provide for appropriate training of Board members and staff on the conduct of their powers and duties;

(C) Direct the conduct of all employees assigned to the Board to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases; to direct that the adjudication of certain cases be deferred, to regulate the assignment of Board members to cases, and otherwise to manage the docket of matters to be decided by the Board;

(D) Evaluate the performance of the Board by making appropriate reports and inspections, and take corrective action where needed;

(E) Adjudicate cases as a Board member; and

(F) Exercise such other authorities as the Director may provide.

(ii) The Chairman shall have no authority to direct the result of an adjudication assigned to another Board member or to a panel; provided, however, that nothing

in this section shall be construed to limit the management authority of the Chairman under paragraph (a)(2)(i) of this section.

(3) *Panels.* The Chairman shall divide the Board into three-member panels and designate a presiding member of each panel if the Chairman or Vice Chairman is not assigned to the panel. The Chairman may from time to time make changes in the composition of such panels and of presiding members. Each three-member panel shall be empowered to decide cases by majority vote, and a majority of the Board members assigned to the panel shall constitute a quorum for such panel. In addition, the Chairman shall assign any number of Board members, as needed, to serve on the screening panel to implement the case management process as provided in paragraph (e) of this section.

(4) *Temporary Board members.* The Director may in his discretion designate immigration judges, retired Board members, retired immigration judges, and administrative law judges employed within, or retired from, EOIR to act as temporary Board members for terms not to exceed six months. In addition, with the approval of the Deputy Attorney General, the Director may designate one or more senior EOIR attorneys with at least ten years of experience in the field of immigration law to act as temporary Board members for terms not to exceed six months. A temporary Board member shall have the authority of a Board member to adjudicate assigned cases, except that temporary Board members shall not have the authority to vote on any matter decided by the Board *en banc.*

(5) *En banc process.* A majority of the permanent Board members shall constitute a quorum for purposes

of convening the Board *en banc*. The Board may on its own motion by a majority vote of the permanent Board members, or by direction of the Chairman, consider any case *en banc*, or reconsider as the Board *en banc* any case that has been considered or decided by a three-member panel. En banc proceedings are not favored, and shall ordinarily be ordered only where necessary to address an issue of particular importance or to secure or maintain consistency of the Board's decisions.

(6) *Board staff.* There shall also be attached to the Board such number of attorneys and other employees as the Deputy Attorney General, upon recommendation of the Director, shall from time to time direct.

(7) [Reserved]

(b) *Appellate jurisdiction.* Appeals may be filed with the Board of Immigration Appeals from the following:

(1) Decisions of Immigration Judges in exclusion cases, as provided in 8 CFR part 240, subpart D.

(2) Decisions of Immigration Judges in deportation cases, as provided in 8 CFR part 1240, subpart E, except that no appeal shall lie seeking review of a length of a period of voluntary departure granted by an Immigration Judge under section 244E of the Act as it existed prior to April 1, 1997.

(3) Decisions of Immigration Judges in removal proceedings, as provided in 8 CFR part 1240, except that no appeal shall lie seeking review of the length of a period of voluntary departure granted by an immigration judge under section 240B of the Act or part 240 of this chapter.

(4) Decisions involving administrative fines and penalties, including mitigation thereof, as provided in part 280 of this chapter.

(5) Decisions on petitions filed in accordance with section 204 of the act (except petitions to accord preference classifications under section 203(a)(3) or section 203(a)(6) of the act, or a petition on behalf of a child described in section 101(b)(1)(F) of the act), and decisions on requests for revalidation and decisions revoking the approval of such petitions, in accordance with section 205 of the act, as provided in parts 204 and 205, respectively, of 8 CFR chapter I or parts 1204 and 1205, respectively, of this chapter.

(6) Decisions on applications for the exercise of the discretionary authority contained in section 212(d)(3) of the act as provided in part 1212 of this chapter.

(7) Determinations relating to bond, parole, or detention of an alien as provided in 8 CFR part 1236, subpart A.

(8) Decisions of Immigration Judges in rescission of adjustment of status cases, as provided in part 1246 of this chapter.

(9) Decisions of Immigration Judges in asylum proceedings pursuant to § 1208.2(b) of this chapter.

(10) Decisions of Immigration Judges relating to Temporary Protected Status as provided in 8 CFR part 1244.

(11) [Reserved]

(12) Decisions of Immigration Judges on applications for adjustment of status referred on a Notice of Certification (Form I-290C) to the Immigration Court in

accordance with §§ 1245.13(n)(2) and 1245.15(n)(3) of this chapter or remanded to the Immigration Court in accordance with §§ 1245.13(d)(2) and 1245.15(e)(2) of this chapter.

(13) Decisions of adjudicating officials in practitioner disciplinary proceedings as provided in subpart G of this part.

(14) Decisions of immigration judges regarding custody of aliens subject to a final order of removal made pursuant to § 1241.14 of this chapter.

(c) *Jurisdiction by certification.* The Commissioner, or any other duly authorized officer of the Service, any Immigration Judge, or the Board may in any case arising under paragraph (b) of this section certify such case to the Board. The Board in its discretion may review any such case by certification without regard to the provisions of § 1003.7 if it determines that the parties have already been given a fair opportunity to make representations before the Board regarding the case, including the opportunity request oral argument and to submit a brief.

(d) *Powers of the Board*—(1) *Generally.* The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations. In addition, the Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.

(i) The Board shall be governed by the provisions and limitations prescribed by applicable law, regulations, and procedures, and by decisions of the Attorney General (through review of a decision of the Board, by written order, or by determination and ruling pursuant to section 103 of the Act).

(ii) Subject to these governing standards, Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.

(2) *Summary dismissal of appeals*—(i) *Standards.* A single Board member or panel may summarily dismiss any appeal or portion of any appeal in any case in which:

(A) The party concerned fails to specify the reasons for the appeal on Form EOIR-26 or Form EOIR-29 (Notices of Appeal) or other document filed therewith;

(B) The only reason for the appeal specified by the party concerned involves a finding of fact or a conclusion of law that was conceded by that party at a prior proceeding;

(C) The appeal is from an order that granted the party concerned the relief that had been requested;

(D) The Board is satisfied, from a review of the record, that the appeal is filed for an improper purpose, such as to cause unnecessary delay, or that the appeal lacks an arguable basis in fact or in law unless the Board determines that it is supported by a good faith argument for extension, modification, or reversal of existing law;

(E) The party concerned indicates on Form EOIR-26 or Form EOIR-29 that he or she will file a brief or statement in support of the appeal and, thereafter, does not file such brief or statement, or reasonably explain his or her failure to do so, within the time set for filing;

(F) The appeal does not fall within the Board's jurisdiction, or lies with the Immigration Judge rather than the Board;

(G) The appeal is untimely, or barred by an affirmative waiver of the right of appeal that is clear on the record; or

(H) The appeal fails to meet essential statutory or regulatory requirements or is expressly excluded by statute or regulation.

(ii) *Action by the Board.* The Board's case management screening plan shall promptly identify cases that are subject to summary dismissal pursuant to this paragraph. An order dismissing any appeal pursuant to this paragraph (d)(2) shall constitute the final decision of the Board.

(iii) *Disciplinary consequences.* The filing by an attorney or representative accredited under § 1292.2(d) of this chapter of an appeal that is summarily dismissed under paragraph (d)(2)(i) of this section may constitute frivolous behavior under § 1003.102(j). Summary dismissal of an appeal under paragraph (d)(2)(i) of this section does not limit the other grounds and procedures for disciplinary action against attorneys or representatives.

(3) *Scope of review.* (i) The Board will not engage in *de novo* review of findings of fact determined by an immigration judge. Facts determined by the immigra-

tion judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.

(ii) The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo.*

(iii) The Board may review all questions arising in appeals from decisions issued by Service officers *de novo.*

(iv) Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service.

(4) *Rules of practice.* The Board shall have authority, with the approval of the Director, EOIR, to prescribe procedures governing proceedings before it.

(5) *Discipline of attorneys and representatives.* The Board shall determine whether any organization or individual desiring to represent aliens in immigration proceedings meets the requirements as set forth in § 1292.2 of this chapter. It shall also determine whether any organization desiring representation is of a kind described in § 1001.1(j) of this chapter, and shall regulate the conduct of attorneys, representatives of organizations, and others who appear in a representative capacity before the Board or the Service or any immigration judge.

(6) *Identity, law enforcement, or security investigations or examinations.* (i) The Board shall not issue a decision affirming or granting to an alien an immigration status, relief or protection from removal, or other immigration benefit, as provided in 8 CFR 1003.47(b), that requires completion of identity, law enforcement, or security investigations or examinations if:

(A) Identity, law enforcement, or security investigations or examinations have not been completed during the proceedings;

(B) DHS reports to the Board that the results of prior identity, law enforcement, or security investigations or examinations are no longer current under the standards established by DHS and must be updated; or

(C) Identity, law enforcement, or security investigations or examinations have uncovered new information bearing on the merits of the alien's application for relief.

(ii) Except as provided in paragraph (d)(6)(iv) of this section, if identity, law enforcement, or security investigations or examinations have not been completed or DHS reports that the results of prior investigations or examinations are no longer current under the standards established by DHS, then the Board will determine the best means to facilitate the final disposition of the case, as follows:

(A) The Board may issue an order remanding the case to the immigration judge with instructions to allow DHS to complete or update the appropriate identity, law enforcement, or security investigations or examinations pursuant to § 1003.47; or

(B) The Board may provide notice to both parties that in order to complete adjudication of the appeal the

case is being placed on hold until such time as all identity, law enforcement, or security investigations or examinations are completed or updated and the results have been reported to the Board.

(iii) In any case placed on hold under paragraph (d)(6)(ii)(B) of this section, DHS shall report to the Board promptly when the identity, law enforcement, or security investigations or examinations have been completed or updated. If DHS obtains relevant information as a result of the identity, law enforcement, or security investigations or examinations, or if the applicant fails to comply with necessary procedures for collecting biometrics or other biographical information, DHS may move to remand the record to the immigration judge for consideration of whether, in view of the new information or the alien's failure to comply, the immigration relief should be denied, either on grounds of eligibility or, where applicable, as a matter of discretion.

(iv) The Board is not required to remand or hold a case pursuant to paragraph (d)(6)(ii) of this paragraph if the Board decides to dismiss the respondent's appeal or deny the relief sought.

(v) The immigration relief described in 8 CFR 1003.47(b) and granted by the Board shall take effect as provided in 8 CFR 1003.47(i).

(7) *Finality of decision.* The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. The Board may return a case to the Service or an immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case.

(e) *Case management system.* The Chairman shall establish a case management system to screen all cases and to manage the Board's caseload. Unless a case meets the standards for assignment to a three-member panel under paragraph (e)(6) of this section, all cases shall be assigned to a single Board member for disposition. The Chairman, under the supervision of the Director, shall be responsible for the success of the case management system. The Chairman shall designate, from time to time, a screening panel comprising a sufficient number of Board members who are authorized, acting alone, to adjudicate appeals as provided in this paragraph.

(1) *Initial screening.* All cases shall be referred to the screening panel for review. Appeals subject to summary dismissal as provided in paragraph (d)(2) of this section should be promptly dismissed.

(2) *Miscellaneous dispositions.* A single Board member may grant an unopposed motion or a motion to withdraw an appeal pending before the Board. In addition, a single Board member may adjudicate a Service motion to remand any appeal from the decision of a Service officer where the Service requests that the matter be remanded to the Service for further consideration of the appellant's arguments or evidence raised on appeal; a case where remand is required because of a defective or missing transcript; and other procedural or ministerial issues as provided by the case management plan.

(3) *Merits review.* In any case that has not been summarily dismissed, the case management system shall arrange for the prompt completion of the record of proceedings and transcript, and the issuance of a briefing schedule. A single Board member assigned under the case management system shall determine the appeal on

the merits as provided in paragraph (e)(4) or (e)(5) of this section, unless the Board member determines that the case is appropriate for review and decision by a three-member panel under the standards of paragraph (e)(6) of this section. The Board member may summarily dismiss an appeal after completion of the record of proceeding.

(4) *Affirmance without opinion.* (i) The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or

(B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

(ii) If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 CFR 3.1(e)(4)" An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the rea-

soning of that decision, but does signify the Board's conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial.

(5) *Other decisions on the merits by single Board member.* If the Board member to whom an appeal is assigned determines, upon consideration of the merits, that the decision is not appropriate for affirmance without opinion, the Board member shall issue a brief order affirming, modifying, or remanding the decision under review, unless the Board member designates the case for decision by a three-member panel under paragraph (e)(6) of this section under the standards of the case management plan. A single Board member may reverse the decision under review if such reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation. A motion to reconsider or to reopen a decision that was rendered by a single Board member may be adjudicated by that Board member unless the case is reassigned to a three-member panel as provided under the standards of the case management plan.

(6) *Panel decisions.* Cases may only be assigned for review by a three-member panel if the case presents one of these circumstances:

(i) The need to settle inconsistencies among the rulings of different immigration judges;

(ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;

(iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents;

(iv) The need to resolve a case or controversy of major national import;

(v) The need to review a clearly erroneous factual determination by an immigration judge; or

(vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 1003.1(e)(5).

(7) *Oral argument.* When an appeal has been taken, a request for oral argument if desired shall be included in the Notice of Appeal. A three-member panel or the Board *en banc* may hear oral argument, as a matter of discretion, at such date and time as is established under the Board's case management plan. Oral argument shall be held at the offices of the Board unless the Deputy Attorney General or his designee authorizes oral argument to be held elsewhere. The Service may be represented before the Board by an officer of the Service designated by the Service. No oral argument will be allowed in a case that is assigned for disposition by a single Board member.

(8) *Timeliness.* As provided under the case management system, the Board shall promptly enter orders of summary dismissal, or other miscellaneous dispositions, in appropriate cases. In other cases, after completion of the record on appeal, including any briefs, motions, or other submissions on appeal, the Board member or panel to which the case is assigned shall issue a decision on the merits as soon as practicable, with a priority for cases or custody appeals involving detained aliens.

(i) Except in exigent circumstances as determined by the Chairman, or as provided in paragraph (d)(6) of

this section, the Board shall dispose of all appeals assigned to a single Board member within 90 days of completion of the record on appeal, or within 180 days after an appeal is assigned to a three-member panel (including any additional opinion by a member of the panel).

(ii) In exigent circumstances, the Chairman may grant an extension in particular cases of up to 60 days as a matter of discretion. Except as provided in paragraph (e)(8)(iii) or (iv) of this section, in those cases where the panel is unable to issue a decision within the established time limits, as extended, the Chairman shall either assign the case to himself or a Vice-Chairman for final decision within 14 days or shall refer the case to the Attorney General for decision. If a dissenting or concurring panel member fails to complete his or her opinion by the end of the extension period, the decision of the majority will be issued without the separate opinion.

(iii) In rare circumstances, when an impending decision by the United States Supreme Court or a United States Court of Appeals, or impending Department regulatory amendments, or an impending *en banc* Board decision may substantially determine the outcome of a case or group of cases pending before the Board, the Chairman may hold the case or eases until such decision is rendered, temporarily suspending the time limits described in this paragraph (e)(8).

(iv) For any case ready for adjudication as of September 25, 2002, and that has not been completed within the established time lines, the Chairman may, as a matter of discretion, grant an extension of up to 120 days.

(v) The Chairman shall notify the Director of EOIR and the Attorney General if a Board member consistently fails to meet the assigned deadlines for the disposition of appeals, or otherwise fails to adhere to the standards of the case management system. The Chairman shall also prepare a report assessing the timeliness of the disposition of cases by each Board member on an annual basis.

(vi) The provisions of this paragraph (e)(8) establishing time limits for the adjudication of appeals reflect an internal management directive in favor of timely dispositions, but do not affect the validity of any decision issued by the Board and do not, and shall not be interpreted to, create any substantive or procedural rights enforceable before any immigration judge or the Board, or in any court of law or equity.

(f) *Service of Board decisions.* The decision of the Board shall be in writing and copies thereof shall be transmitted by the Board to the Service and a copy shall be served upon the alien or party affected as provided in part 292 of this chapter.

(g) *Decisions as precedents.* Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board, and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States. By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues. Selected decisions designated by the Board, decisions of

the Attorney General, and decisions of the Secretary of Homeland Security to the extent authorized in paragraph (i) of this section, shall serve as precedents in all proceedings involving the same issue or issues.

(h) *Referral of cases to the Attorney General.* (1) The Board shall refer to the Attorney General for review of its decision all cases that:

(i) The Attorney General directs the Board to refer to him.

(ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review.

(iii) The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, refers to the Attorney General for review.

(2) In any case the Attorney General decides, the Attorney General's decision shall be stated in writing and shall be transmitted to the Board or Secretary, as appropriate, for transmittal and service as provided in paragraph (f) of this section.

(i) *Publication of Secretary's precedent decisions.* The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, may file with the Attorney General decisions relating to the administration of the immigration laws of the United States for publication as precedent in future proceedings, and, upon approval of the Attorney General as to the lawfulness of such decision, the Director of the Executive Office for Immigration Review shall cause

such decisions to be published in the same manner as decisions of the Board and the Attorney General.

(j) *Continuation of jurisdiction and procedure.* The jurisdiction of, and procedures before, the Board of Immigration Appeals in exclusion, deportation, removal, rescission, asylum-only, and any other proceedings, shall remain in effect as in effect on February 28, 2003, until the regulations in this chapter are further modified by the Attorney General. Where a decision of an officer of the Immigration and Naturalization Service was, before March 1, 2003, appealable to the Board or to an immigration judge, or an application denied could be renewed in proceedings before an immigration judge, the same authority and procedures shall be followed until further modified by the Attorney General.

13. 8 C.F.R. 1003.13 provides:

Definitions.

As used in this subpart:

Administrative control means custodial responsibility for the Record of Proceeding as specified in § 1003.11.

Charging document means the written instrument which initiates a proceeding before an Immigration Judge. For proceedings initiated prior to April 1, 1997, these documents include an Order to Show Cause, a Notice to Applicant for Admission Detained for Hearing before Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien. For proceedings initiated after April 1, 1997, these documents

include a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien.

Filing means the actual receipt of a document by the appropriate Immigration Court.

Service means physically presenting or mailing a document to the appropriate party or parties; except that an Order to Show Cause or Notice of Deportation Hearing shall be served in person to the alien, or by certified mail to the alien or the alien's attorney and a Notice to Appear or Notice of Removal Hearing shall be served to the alien in person, or if personal service is not practicable, shall be served by regular mail to the alien or the alien's attorney of record.

14. 8 C.F.R. 1003.14 provides:

Jurisdiction and commencement of proceedings.

(a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed. However, no charging document is required to be filed with the Immigration Court to commence bond proceedings pursuant to §§ 1003.19, 1236.1(d) and 1240.2(b) of this chapter.

(b) When an Immigration Judge has jurisdiction over an underlying proceeding, sole jurisdiction over applications for asylum shall lie with the Immigration Judge.

(c) Immigration Judges have jurisdiction to administer the oath of allegiance in administrative naturalization ceremonies conducted by the Service in accordance with § 1337.2(b) of this chapter.

(d) The jurisdiction of, and procedures before, immigration judges in exclusion, deportation and removal, rescission, asylum-only, and any other proceedings shall remain in effect as it was in effect on February 28, 2003, until the regulations in this chapter are further modified by the Attorney General. Where a decision of an officer of the Immigration and Naturalization Service was, before March 1, 2003, appealable to the Board or an immigration judge, or an application denied could be renewed in proceedings before an immigration judge, the same authority and procedures shall be followed until further modified by the Attorney General.

15. 8 C.F.R. 1003.15 provides:

Contents of the order to show cause and notice to appear and notification of change of address.

(a) In the Order to Show Cause, the Service shall provide the following administrative information to the Executive Office for Immigration Review. Omission of any of these items shall not provide the alien with any substantive or procedural rights:

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship;

(5) The language that the alien understands;

(b) The Order to Show Cause and Notice to Appear must also include the following information:

(1) The nature of the proceedings against the alien;

(2) The legal authority under which the proceedings are conducted;

(3) The acts or conduct alleged to be in violation of law;

(4) The charges against the alien and the statutory provisions alleged to have been violated;

(5) Notice that the alien may be represented, at no cost to the government, by counsel or other representative authorized to appear pursuant to 8 CFR 1292.1;

(6) The address of the Immigration Court where the Service will file the Order to Show Cause and Notice to Appear; and

(7) A statement that the alien must advise the Immigration Court having administrative control over the Record of Proceeding of his or her current address and telephone number and a statement that failure to provide such information may result in an *in absentia* hearing in accordance with § 1003.26.

(c) *Contents of the Notice to Appear for removal proceedings.* In the Notice to Appear for removal proceedings, the Service shall provide the following administrative information to the Immigration Court. Failure to provide any of these items shall not be construed as affording the alien any substantive or procedural rights.

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship; and

(5) The language that the alien understands.

(d) *Address and telephone number.* (1) If the alien's address is not provided on the Order to Show Cause or Notice to Appear, or if the address on the Order to Show Cause or Notice to Appear is incorrect, the alien must provide to the Immigration Court where the charging document has been filed, within five days of service of that document, a written notice of an address and telephone number at which the alien can be contacted. The alien may satisfy this requirement by completing and filing Form EOIR-33.

(2) Within five days of any change of address, the alien must provide written notice of the change of address on Form EOIR-33 to the Immigration Court where the charging document has been filed, or if venue has been changed, to the Immigration Court to which venue has been changed.

16. 8. C.F.R. 1003.18 provides:

Scheduling of cases.

(a) The Immigration Court shall be responsible for scheduling cases and providing notice to the government and the alien of the time, place, and date of hearings.

(b) In removal proceedings pursuant to section 240 of the Act, the Service shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, where practicable. If that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing. In the case of any change or postponement in the time and place of such proceeding, the Immigration Court shall provide written notice to the alien specifying the new time and place of the proceeding and the consequences under section 240(b)(5) of the Act of failing, except under exceptional circumstances as defined in section 240(e)(1) of the Act, to attend such proceeding. No such notice shall be required for an alien not in detention if the alien has failed to provide the address required in section 239(a)(1)(F) of the Act.

17. 8 C.F.R. 1239.1 provides:

Notice to appear.

(a) *Commencement.* Every removal proceeding conducted under section 240 of the Act (8 U.S.C. 1229a) to determine the deportability or inadmissibility of an alien is commenced by the filing of a notice to appear with the immigration court. For provisions relating to the issuance of a notice to appear by an immigration officer, or supervisor thereof, see 8 CFR 239.1(a).

(b) *Service of notice to appear.* Service of the notice to appear shall be in accordance with section 239 of the Act.

No. 17-459

IN THE

Supreme Court of the United States

WESCLEY FONSECA PEREIRA,

Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

REPLY BRIEF FOR PETITIONER

DAVID J. ZIMMER
ALEXANDRA LU
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210

JEFFREY B. RUBIN
TODD C. POMERLEAU
RUBIN POMERLEAU PC
3 Center Plaza, Ste. 400
Boston, MA 02108

WILLIAM M. JAY
Counsel of Record
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinlaw.com
(202) 346-4000

Counsel for Petitioner

April 13, 2018

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REPLY BRIEF FOR PETITIONER

The stop-time rule states that an immigrant's qualifying residence is "deemed to end" when the government serves "a notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). Section 1229(a), in turn, defines a "notice to appear": Using standard definitional language that appears throughout the U.S. Code, section 1229(a) specifies that the document "in this section referred to as a 'notice to appear'" is "written notice . . . specifying" particular information. Notice that does not tell the immigrant where and when to appear is not the type of notice that is "referred to as a 'notice to appear'" in section 1229(a), and does not trigger the stop-time rule.

Neither of the government's two attempts to avoid the statute's straightforward text is defensible. First, the government asserts (at 31-32) that section 1229(a) does not define a "notice to appear" at all. But the government cannot explain what "referred to as a 'notice to appear'" could be *other than* a definition of that phrase. Congress has itself described identical language as definitional, and even the government admits (at 32) that "notice to appear" is a "shorthand label" for "the written notice to be given," which includes *all* the information specified in section 1229(a). Second, the government claims (at 22-24) that "under" could mean "governed by." But in this context, "under" unambiguously connects the defined phrase to the provision that defines it—it thus takes on its ordinary meaning of "in accordance with" or "according to." The government's interpretation would deprive the stop-time trigger of any substantive meaning: It would allow

the government to trigger the stop-time rule by serving a notice that includes no information at all.

In reality, the government's position, like the BIA's decision, is based not on the statute's text, but on the government's desire to avoid stop-time consequences from its refusal to accept section 1229(a)'s requirement that a "notice to appear" must specify the "time and place" of proceedings. The government tries to minimize its noncompliance by characterizing "time and place" information as a "ministerial detail[]" (at 41), and a "technical, immaterial omission" (at 39). But while the government might consider the omitted information "immaterial," the statute does not. The statute requires "time and place" information on the same terms as the other required information, and the government does not, and could not contend that *all* information required by section 1229(a) is "immaterial." Indeed, even the phrase "notice *to appear*" implies notice of, at the very least, *when and where to appear*. Requiring "time and place" information in the stop-time trigger is particularly important given the rule's purpose of preventing immigrants from avoiding or delaying proceedings: Before an actual hearing is scheduled, there is nothing to avoid or delay.

The government also complains (at 48) that "administrative realities" make it hard to include "time and place" information in the "notice to appear." But Congress, fully aware of these realities, both defined a "notice to appear" to require information about when and where to appear, and triggered the stop-time rule on service of that "notice to appear." Congress's faith that executive agencies could coordinate scheduling hearings was understandable. Municipal

governments include the date and time of the initial hearing on *traffic tickets*. NIJC Br. 31-32 & n.9. And such coordination would have benefits far beyond the stop-time rule. BIA Chairman Schmidt Br. 2-6. The government thus complains of problems of its own making, problems that IIRIRA told it to solve. The BIA cannot, and this Court should not, interpret the stop-time rule simply to avoid the consequences of the government's stubborn refusal to follow the statute.

I. "Notice To Appear Under Section 1229(a)" Unambiguously Means Notice That Satisfies Section 1229(a)'s Definition Of A "Notice To Appear"

A. The Text Is Unambiguous

The government's attempts to avoid the statute's plain meaning cannot be squared with the statute's text: Section 1229(a) defines a "notice to appear," and section 1229b(d)(1) triggers the stop-time rule on service of that statutorily-defined document. That interpretation is supported by other uses of similar language in the removal provisions.

1. Section 1229(a) defines the phrase "notice to appear": Notice "in this section referred to as a 'notice to appear'" is "written notice . . . specifying" the information listed in the statute. By its own terms, that is definitional language. When section 1229(a) "refer[s] to" a "notice to appear," it refers to a notice that includes the specified information, and not to a paper that does not.

The government's assertion (at 32) that "[s]ection 1229(a) is not worded in the form of a definition" is

simply wrong. Indeed, the government, after contesting that section 1229(a) is definitional, concedes that the statute makes the phrase "notice to appear" a "shorthand label for the written notice to be given." But of course, the "written notice to be given" is *all* the information the statute requires. *See* Gov't Br. 3 (acknowledging that "[a] notice to appear must specify" all the information in section 1229(a)(1)). The statute thus defines "notice to appear" as notice that provides all the required information, not notice of whatever subset of that information the government deigns to provide.

Congress has explicitly recognized that a parenthetical "referred to as" establishes a definition. In one particularly clear example, Congress created a new class of drugs by identifying the criteria those drugs must meet, and then stated (parenthetically) that "[i]n this section, such a drug is referred to as a 'fast track product.'" Food and Drug Administration Modernization Act of 1997, Pub. L. 105-115, § 112(a), 111 Stat. 2309 (21 U.S.C. § 356(a)). Then, in the next subsection, Congress ordered the "Secretary of Health and Human Services [to] issue guidance for fast track products (*as defined in* [the preceding subsection])." § 112(b), 111 Stat. 2310 (emphasis added). Consistent with Congress's recognition that this language is definitional, statutes routinely identify certain criteria, explain that those criteria are collectively "referred to" using a specific term or phrase, and then use that defined term or phrase to mean the criteria previously identified. *E.g.*, 26 U.S.C. § 6038A(a)(1) ("reporting corporation"); 21 U.S.C. § 356(a) ("breakthrough therapy"); 38 U.S.C. § 7451(a)(2) ("covered positions"); 42 U.S.C. § 285g-4(b) ("medical rehabilitation"). Section 1229(a) de-

fines a "notice to appear" in precisely this standard way: It describes written notice specifying particular information, defines this notice as a "notice to appear," and then uses the phrase "notice to appear" to mean notice of the specified information.

2. By triggering the stop-time rule on service of a "notice to appear under section 1229(a)," the statute unambiguously invokes the defined term "notice to appear" as the stop-time trigger. The government argues that this provision is ambiguous because "under" can mean "governed by." But a word is not ambiguous simply because it has multiple dictionary definitions. "Ambiguity is a creature not of definitional possibilities but of statutory context," *Brown v. Gardner*, 513 U.S. 115, 118 (1994), and the word "under" "draw[s] its meaning from its context," *Ardestani v. INS*, 502 U.S. 129, 135 (1991). *See also Deal v. United States*, 508 U.S. 129, 132 (1993) (although the statute used a word with multiple potential meanings, the statute was "unambiguous" because the word's meaning was clear "from the context in which it is used").

In this context, "under" unambiguously connects the reference to a "notice to appear" with the statutory provision that defines that term. It thus means "in accordance with" or "according to," standard definitions of "under," as this Court has recognized. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 630 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 530 (2013) (citing 18 *Oxford English Dictionary* 950 (2d ed. 1989)); *see also Black's Law Dictionary* 1525 (6th ed. 1990) (defining "under" as "according to" in the version in circulation at the time of IIRIRA); *Niang v. Holder*, 762 F.3d 251, 253-54 (2d

Cir. 2014) (requirement that alien be provided "notice under paragraph (4)(A)" "plainly states" that alien must receive the substantive information required by that paragraph). The statute unambiguously triggers the stop-time rule on service of a "notice to appear" "in accordance with" section 1229(a)'s definition of that term.

Interpreting "under" to mean "governed by" would not help the government, because on the government's interpretation section 1229(a) would not actually "govern" the notice to appear. Section 1229(a) governs a "notice to appear" by specifying what it must contain; if the government were correct that a document *with or without* those contents can be a notice to appear for purposes of the stop-time rule, then that document would not be "governed by" section 1229(a) in any real sense. It is neither coherent nor permissible to interpret the word "under" to deprive the phrase "notice to appear under section 1229(a)" of any substantive meaning.

None of the cases on which the government relies interprets a statute remotely similar to this one—*i.e.*, a statute that refers to a statutory term "under" another provision that defines that term. For instance, this Court's decision earlier this Term in *National Association of Manufacturers* involved the question whether a particular regulation was "promulgated . . . under section 1311" of Title 33 of the U.S. Code. 138 S. Ct. at 629-31. Far from finding the word "under" inherently ambiguous, this Court found it "clear" given that "statutory context" that "under" meant "pursuant to" or "by reason of the authority of." *Id.* at 630. Just as the (very different) context in that case "ma[d]e clear" that the statute referred to a

regulation promulgated under the authority of the referenced section, the context of the stop-time rule "makes clear" that the statute refers to a "notice to appear" according to section 1229(a)'s definition of that term.[1]

3. Other related statutory provisions support interpreting a "notice to appear under section 1229(a)" as notice with the content specified in the statute, not just a particular label.

a. Section 1229 ensures the "opportunity to secure counsel before the first hearing date" by requiring that date be at least "10 days after the service of the notice to appear." 8 U.S.C. § 1229(b)(1); *see* Pet. Br. 29. The government would render this opportunity illusory. According to the government (at 35), section 1229(b)(1) requires only that the hearing be set "at least ten days after the *original* notice is served" (emphasis added), regardless of whether the "notice" served is one that satisfies all, or any, of the elements of section 1229(a)'s "notice to appear" definition. Thus, the government could serve notice that did not inform the immigrant of the hearing date, the relevant charges, or even the right to counsel, and then, years later, provide that information hours before the hearing. While that might theoretically allow an immigrant to retain counsel, it does not allow an immigrant to secure counsel who could prepare for, or even show up at, the hearing.

b. The in absentia provision's references to "written notice required under paragraph (1) or (2) of sec-

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[1] The government's reliance (at 24) on Fed. R. Civ. P. 26(e)(1) is similarly misplaced, as that Rule also does not use the word "under" to connect a defined term to the provision defining it.

tion 1229(a)," 8 U.S.C. § 1229a(b)(5)(A), and "notice in accordance with paragraph (1) or (2) of section 1229(a)," *id.* § 1229a(b)(5)(C)(ii), do not support the government's position. *See* Gov't Br. 25-26. The government concedes that these phrases require notice of *all* information listed in section 1229(a)'s "notice to appear" definition. But the government argues that because the stop-time rule uses a third, similar phrase—"notice to appear under section 1229(a)"—it must encompass notice that does *not* provide that information.

As an initial matter, this argument fails on its own terms. The government claims (at 25-26) that Congress necessarily intends different language to have different meanings, but then recognizes (at 26) that Congress used *different* phrases—"written notice required under" and "notice in accordance with"—to mean *exactly the same thing* in *the same paragraph* of section 1229a(b). It is therefore unremarkable that the stop-time rule—which appears in a different section altogether—describes notice that satisfies section 1229(a)'s definition of a "notice to appear" using distinct, but similar language. *See Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 156 (2013) (characterizing the idea that different text generally has different meaning as a "rule of thumb" that the statute's text and context can rebut).

Further, Congress had good reason to use slightly different language in the in absentia provision, which requires compliance with *two* notice requirements. While "notice to appear" is a defined term encompassing the notice required under paragraph (1) of section 1229(a), there is no defined term encompassing the notice required under paragraph (2).

Thus, while Congress could have referred to the notice required under both provisions as "a notice to appear under paragraph (1) or notice required under [or in accordance with] paragraph (2)," it was far simpler to refer to "notice required under [or in accordance with] paragraph (1) or (2)." Both phrases unambiguously encompass notice that meets both statutory notice requirements, and Congress understandably decided to use the simpler phrasing. In the stop-time rule, Congress described compliant notice as "notice to appear under section 1229(a)" not due to a "mistake in draftsmanship" (*see* Gov't Br. 26), but because the stop-time rule requires compliance *only* with the "notice to appear" definition in paragraph (1). *See Clay v. United States*, 537 U.S. 522, 530-31 (2003) ("one can readily comprehend why Congress might have" used different language to convey the same meaning given the different "context"). Indeed, the similarity of the language in the in absentia and stop-time provisions suggests that only notice meeting section 1229(a)'s "notice to appear" definition triggers the stop-time rule. *See* Pet. Br. 29-30.

c. The government notes (at 26-27) that immigrants face *additional* negative consequences for failing to appear at a hearing after receiving *oral* notice of the hearing date in a "language the alien understands." 8 U.S.C. § 1229a(b)(7). That provision recognizes an immigrant's increased culpability for failing to appear when it is *certain* the immigrant knew the hearing date—*i.e.*, where there is no risk the immigrant did not receive mailed notice, or does not understand English. It does not suggest, as the government would have it, that if Congress cared about

providing notice of a hearing time and place it would have required oral notice.

4. The government misreads this Court's decisions in *Becker v. Montgomery*, 532 U.S. 757 (2001), *Scarborough v. Principi*, 541 U.S. 401, 416 (2004), and *Edelman v. Lynchburg College*, 535 U.S. 106, 116 (2002). *See* Gov't Br. 32-34. Each of those cases turned on the specific provision at issue, not a general rule that courts or agencies can ignore statutory requirements that they deem unimportant. *Becker* held that a *pro se* litigant's failure to manually sign a notice of appeal could be corrected because the rules allow such correction. 532 U.S. at 764. *Edelman* upheld a regulation allowing a verification to be filed after the charges it verified because the statute did not require that "the charge must be verified when filed." 535 U.S. at 112. And *Scarborough* held that the statute allowed a required allegation that the government's position was "not substantially justified" to relate back to an earlier attorney's fee application under Federal Rule of Civil Procedure 15(c). 541 U.S. at 417-19. These decisions shed no light on the meaning of the entirely different and unrelated provision at issue in this case.

Even if these cases suggest that courts can, at times, excuse accidental "technical defects" (Gov't Br. 33), the omission of where and when to appear from a "notice to appear" is no "technical, immaterial omission" (Gov't Br. 39). The government cannot explain how its systematic refusal to inform a noncitizen when and where to appear in its initial notice is analogous to a *pro se* litigant's unintentional failure to manually sign a notice of appeal in *Becker*, or the unintentional failure to include the required verifica-

tions in *Scarborough* and *Edelman*. Indeed, IIRIRA's history suggests that Congress believed the time and place of an actual hearing was a particularly important piece of information—IIRIRA amended the INA to make such information *mandatory* in the "notice to appear," when it had previously been optional in an "order to show cause." *See* Pet. Br. 9-12.

The government's sole attempt to link this case to *Becker*, *Scarborough* and *Edelman* is its claim (at 33-34) that an "alien does not need to know the specific hearing date to appreciate that the government intends to seek her removal." But the statute requires more than an indication of intent to trigger the stop-time rule. The stop-time trigger is service of a "notice to appear under section 1229(a)," and section 1229(a) defines a "notice to appear" as notice that informs a noncitizen of specific information, including when and where to appear and *why* the government seeks her removal. 8 U.S.C. §§ 1229b(d)(1), 1229(a)(1). Nothing in this Court's cases allows the government to ignore these substantive requirements because the government deems them unnecessary in light of its self-serving conception of the statute's purpose—a conception that, in any event, has no basis in the statute's text or history. *See* pp. 18-19, *infra*; Pet. Br. 41-43; AILA Br. 22-25.

B. Traditional Interpretive Tools Confirm The Statute's Plain Meaning

1. The statutory structure supports interpreting a "notice to appear under section 1229(a)" as notice satisfying section 1229(a)'s definition of that term—not any document DHS labels as a "notice to appear."

a. Section 1229(a) does not distinguish among the seven categories of information a "notice to appear" must contain; all are required. Pet. Br. 31-34. The government does not, and could not, dispute that the statute treats all these categories identically. Pet. Br. 31-34; Gov't Br. 35-36. Thus, if any are optional, as the BIA held, they all are optional, as the BIA admitted: It described its interpretation of the statute as one that "does not impose substantive requirements for a notice to appear" to trigger the stop-time rule. *Matter of Camarillo*, 25 I. & N. Dec. 644, 647 (BIA 2011). On the BIA's reading, the government could treat as an effective "notice to appear" a document that does not even inform the respondent why the government seeks to remove her from the country.

The government urges this Court to simply dodge this issue because nothing beyond the "time and place" information was omitted in this case. Gov't Br. 36. Naturally the government would prefer not to confront the consequences of its reading until some future case. But the BIA has already let that other shoe drop, holding that the statute does not impose *any* "substantive requirements" on a qualifying notice to appear. *Camarillo*, 25 I. & N. Dec. at 647. And the government identifies no way to read the statute to make one requirement optional and the rest mandatory.

The government also asserts (at 36) that it has "no reason to omit" anything beyond "time and place" information. But if this Court holds that the government can trigger the stop-time rule by serving notice that does not comply with section 1229(a) in any respect, it is impossible to know what reason the gov-

ernment may later find to serve notices that lack, for instance, the "charges against the alien," or the alien's right to counsel. Such a reason could be as simple as a desire to restrict access to a form of relief the government does not like by serving notices before the government determines why (or if) the noncitizen is removable. This Court does not generally trust that the unacceptable consequences of a proposed statutory interpretation will simply not come to pass. *E.g.*, *Kirtsaeng*, 568 U.S. at 543-45.

The government's claim (at 36) that it would be "futile" to omit the "charges against the alien" also makes no sense. The government notes that current regulations require it to file the "notice to appear" with the immigration court. *See* 8 C.F.R. § 1239.1(a). But that filing can occur *years* after service on the immigrant. *See Camarillo*, 25 I. & N. Dec. at 644-45. And the government does not explain why it could not file such a notice while charges are still being determined. Regulations also allow service of "additional or substituted charges" of removal at "any time during the proceeding," 8 C.F.R. § 1240.10(e), and the government could simply use that power to provide charges after its immigration court filing—just as it provides "time and place" information after that filing.[2]

b. The government finds it "improbable" (at 28-30) that the "time and place" information is required to trigger the stop-time rule because such information can be "change[d]" under 8 U.S.C.

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[2] Even if the government needs to provide charges when it files a notice with the immigration court, the government could identify the charges shortly before its filing, which often occurs *years* after the initial notice is served on the immigrant.

§ 1229(a)(2). But other information on the "notice to appear" can also be changed, including the asserted charges. 8 C.F.R. § 1240.10(e). The fact that the statute allows the government to update information on the "notice to appear" does not mean the government can trigger the stop-time rule without providing that information at all. To the contrary, the statute allows for a "change" precisely because it requires that there already *be* a hearing date in the "notice to appear." Pet. Br. 35.

c. The government argues (at 27-28) that the stop-time rule's reference to "a notice to appear under section 1229(a)," rather than "section 1229(a)(1)," somehow implies that the government can trigger the stop-time rule by serving notice that does not satisfy section 1229(a)(1)'s definition of a "notice to appear." Nothing in section 1229(a) *outside* paragraph (1) changes the meaning of the cross-reference; as the government acknowledges (at 27), the "notice to appear" is discussed only in paragraph (1). A "notice to appear under section 1229(a)" thus necessarily is a notice to appear "under section 1229(a)*(1)*." *See* Pet. Br. 34-35.

The government notes (at 27-28) that the in absentia provision refers to specific paragraphs. *See* 8 U.S.C. § 1229a(b)(5)(A), (C)(ii)). But those provisions reference the particular paragraphs because there is no defined term for the notice under paragraph (2). *See* pp. 8-9, *supra*. The stop-time rule refers *only* to a "notice to appear," a term defined *only* in paragraph (1). That is a much more natural explanation for the difference in wording than the strained inference the government tries to draw.

This Court's decision in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061 (2018), interpreted a very different provision. *See* Gov't Br. 27. *Cyan* held that the phrase "except as provided in section 77p of this title with respect to covered class actions" excepts *all* relevant provisions in section 77p, not just those in the "covered class actions" definition in § 77p(f)(2). *Id.* at 1069-71. But where the cross-reference is for the *location* of the statutory definition, there are no other relevant provisions. Thus, if the statute in *Cyan* had referred to a "covered class action under section 77p(f)," that would clearly mean a class action that satisfies the definition in section 77p(f)(2). So too here: A "notice to appear under section 1229(a)" is a notice to appear that satisfies the definition in section 1229(a)(1).

d. The fact that the stop-time rule is only one of many *eligibility* requirements for *discretionary* relief provides further structural support for interpreting the stop-time rule to mean what it says. *See* Pet. Br. 36-38; *Moncrieffe v. Holder*, 569 U.S. 184, 204 (2013). Even an immigrant who accrues the required residence will only receive cancellation if she meets the other, rigorous eligibility requirements *and* is deemed worthy of discretionary relief.

The government agrees (at 46) that only the "most deserving immigrants" can ultimately obtain cancellation; the government argues, though, that those who benefit from interpreting a "notice to appear under section 1229(a)" as notice of the information required by that section are somehow less deserving. But anyone deemed cancellation-eligible under petitioner's interpretation who does *not* deserve relief

will either fail another eligibility requirement, or be denied relief as a matter of discretion.

2. IIRIRA's history supports interpreting the stop-time rule to end continuous residence only upon written notice of all of the information required by section 1229(a).

a. The fact that IIRIRA simultaneously created the "notice to appear," defined it, *and* made it the touchstone of the stop-time rule strongly undermines the government's interpretation of the statute. Pet. Br. 38-41; AILA Br. 8-11. If the Congress that enacted IIRIRA had wanted to trigger the stop-time rule on service of a general "kind of document" that included whatever information the government chose to provide (Gov't Br. 22), it would not have based the trigger on the same term it had just defined as notice of specific information—and, for good measure, cross-referenced the provision that includes that definition.

The government's only response (at 42-43) is that the "notice to appear" definition was "largely" copied from, and "nearly" identical to, the pre-IIRIRA definition of an "order to show cause." But the difference is important: Congress did not thoughtlessly copy the existing term or the existing definition, but adopted the new term "notice to appear" and defined it to require information that the former statute had not.

The change Congress made highlights the importance Congress placed on providing "time and place" information. The government repeatedly tries to marginalize the initial hearing date—characterizing it as a "procedural detail" (at 46), a "ministerial detail[]" (at 41), and a "technical, imma-

terial omission" (at 39). But *Congress* thought the information sufficiently important to warrant revising the statute to ensure that the information be included in a "notice to appear." Indeed, even Congress's decision to rename the document a "notice *to appear*"—not, for instance, a "notice of intent to seek removal"—shows the importance Congress placed on including *when and where to appear* in a qualifying notice.

Congress's decision that the stop-time rule could sometimes apply retroactively to pre-IIRIRA "orders to show cause" does not diminish the importance of "time and place" information. *See* Gov't Br. 44-45 (citing Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, Tit. II, sec. 203(1), § 309(c)(5)(A), 111 Stat. 2196 ("NACARA")). NACARA made retroactive application of the stop-time rule both broader and narrower than its prospective application—sometimes the stop-time rule was triggered by an order to show cause, sometimes the rule did not apply at all. *See* NACARA § 203(1), 111 Stat. 2196-98. NACARA's legislative history recognizes as much, noting that the stop-time rule is triggered prospectively by "receipt of a 'notice to appear,' the new document [IIRIRA] created," but applies retroactively, if at all, to the *different* document called an "order to show cause." 143 Cong. Rec. S12265, S12266 (daily ed. Nov. 9, 1997).

b. IIRIRA's legislative history shows that Congress enacted the stop-time rule to ensure that immigrants could not gain qualifying time by "seeking to delay proceedings" or by "fail[ing] to appear for their deportation proceedings" and later seeking to reopen them. Pet. Br. 41-42; H.R. Rep. No. 104-469,

pt. I, at 121-22 (1996). Consistent with that purpose, Congress triggered the stop-time rule, and ended accrual of qualifying residence, when the government provided notice of and about an *actual* proceeding that the immigrant could try to delay or avoid. Triggering the stop-time rule before a removal proceeding has even been scheduled disqualifies otherwise-deserving cancellation applicants without doing *anything* to further Congress's expressed objectives.

The government cannot seriously dispute this point. Its discussion of the legislative history only identifies Congressional concerns about delays caused by *immigrants*, not the government. Gov't Br. 38. Even though governmental delay extended an immigrant's qualifying residence before IIRIRA—including delays between serving the "order to show cause" and the subsequent hearing notice—*nothing* in the legislative history suggests Congressional concern about such *governmental* delays.

With no support in the actual legislative history, the government simply invents its own, broader "core objective" of the stop-time rule: preventing immigrants from accruing qualifying time "after being notified that the government intends to remove them." Gov't Br. 39. The government cites, quite literally, nothing to support this supposed purpose—it is entirely made up to support the government's position. The government notes that a statute's *text* can have effects not discussed in the legislative history. *See* Gov't Br. 41 (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 115 (1988)). But to make a *non*-textual argument based on the statute's purpose, the government must have *some* evidence supporting its char-

acterization of that purpose. The government has none.

The government also asserts (at 41-42), without any explanation, that an immigrant could seek to avoid or delay proceedings even before the government schedules, and serves notice of, an actual hearing. This makes no sense. The government can, whenever it wants, stop an immigrant from accruing time by serving notice of the information specified in section 1229(a). Even if the government omits service of the "time and place" information from its initial notice, there is nothing an immigrant could do to delay service of notice that provides such information. An immigrant also cannot *avoid* such service because the government need only mail it to "the last address provided by the alien." 8 U.S.C. § 1229(c); *see also id.* §§ 1229(a)(2)(B), 1229a(b)(5)(B).

A plain-text interpretation of the statute thus gives the government full power to end an immigrant's qualifying residence by providing the statutorily-required notice. There is no evidence—in the statute, in the legislative history, or anywhere else—that Congress sought to prevent residence from accruing while the *government* delayed in providing the required notice.

3. To the extent any slight ambiguities "linger[]" after considering the statute's text, structure, and history, the "longstanding principle of construing [such] ambiguities in deportation statutes in favor of the alien" resolves them. *INS v. St. Cyr*, 533 U.S. 289, 320 & n.45 (2001); Pet. Br. 44-48. The government disputes neither this established rule of construction, nor that "normal tools of statutory interpretation" apply at *Chevron*'s first step. *Esquivel-*

Quintana v. Sessions, 137 S. Ct. 1562, 1569, 1572 (2017). The government also admits (at 51) that this Court applied this precise rule in *St. Cyr* in finding no ambiguity under *Chevron*'s first step.

The government's only argument (at 50-51) is that this interpretive canon is not "dispositive" in a case governed by *Chevron*. But the question is not whether the canon is independently "dispositive," but whether it plays a role, along with other interpretive canons, at *Chevron*'s first step. This Court already held in *St. Cyr* that it *does* play such a role. 533 U.S. at 320 & n.45. That does not mean that when there is deep, unresolvable ambiguity, the principle that deportation provisions should be construed favorably to noncitizens trumps agency deference. *See* Gov't Br. 50; Pet. Br. 47 n.8. But when, as in this case, there are strong textual, structural, and historical arguments that the statute precludes the agency's interpretation, then the principle that removal provisions should be construed in favor of noncitizens can "buttress[]" those arguments and resolve, for *Chevron* purposes, any "lingering" ambiguities, as it did in *St. Cyr*. 533 U.S. at 320.

II. The BIA's Interpretation Is Unreasonable

1. Aside from its flawed textual, historical, and structural arguments, the BIA's justification for its statutory interpretation rested on its desire to allow the government to avoid the stop-time consequences of its systematic failure to follow IIRIRA's command that the "time and place" of the hearing be included in a "notice to appear." 8 U.S.C. § 1229(a)(1); 8 C.F.R. § 1003.18(b); Pet. Br. 49-52. But it is a "core administrative-law principle that an agency may not

rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014). The government's disagreement with the statute's instruction that a "notice to appear" must include "time and place" information cannot be the basis for concluding that the stop-time rule does not require such information.

The government cannot seriously contend that providing such information in the "notice to appear" is impossible. Congress certainly did not think it impossible: Knowing full well the "practical administrative realities" the government invokes (at 48), Congress nevertheless instructed that the government must include the "time and place at which the proceedings will be held" in a "notice to appear." 8 U.S.C. § 1229(a)(1)(G)(i). Congress's belief that executive agencies could coordinate scheduling hearings was understandable. The government admits (at 50 n.15) that it built a "scheduling system" that allowed for such coordination, but then abandoned that system for no apparent reason. *See also* NIJC Br. 30-32; BIA Chairman Schmidt Br. 6-8. Such an integrated system would create administrative efficiencies that stretch far beyond the stop-time rule. BIA Chairman Schmidt Br. 2-6. And as *amicus* notes, municipal governments are able to provide the date and time of an initial hearing on *traffic tickets*.[3] NIJC Br. 31-32.

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[3] Private companies also sell technology for integrating law enforcement and court calendaring. *E.g.*, Tyler Technologies, *Odyssey Integrated Courts & Justice Solution*, https://www.tylertech.com/solutions-products/odyssey-product-suite/odyssey-integrated-justice.

In reality, therefore, the government simply has not bothered to do what IIRIRA instructs. The BIA cannot reasonably twist the statute's text to avoid stop-time consequences from the government's refusal to follow the statute.

2. The BIA's decision in *Matter of Ordaz*, 26 I. & N. Dec. 637 (BIA 2015), which held that a notice the government never files in immigration court does not trigger the stop-time rule, exposes the unreasonableness of the BIA's earlier decision in *Camarillo*. Pet. Br. 52-55. The government is simply wrong (at 52) that triggering the stop-time rule on notice that does not satisfy section 1229(a)'s definition "leads to none of the concerns *Ordaz* addressed." *Ordaz* recognized the unfairness of triggering the stop-time rule on a "charging document that was . . . insufficient to support a removal charge *as issued*." 26 I. & N. Dec. at 640 (emphasis added). *Camarillo guarantees* that such an insufficient charging document will be a stop-time trigger, as the government admits (at 52-53) that notice lacking the "time and place" information *cannot* support a removal charge.

The government does not dispute that *Ordaz* and *Camarillo* make the stop-time trigger turn on "the fortuity of an individual official's decision." *Judulang v. Holder*, 565 U.S. 42, 58 (2011); Pet. Br. 53-55. According to the BIA, whether notice that lacks required information triggers the stop-time rule depends on the label the government later uses to provide the missing information—if the government serves a new "notice to appear," only that new notice triggers the stop-time rule under *Ordaz*; if it serves notice that includes only the missing information,

then the prior, incomplete notice triggers the stop-time rule under *Camarillo*.

It is the BIA's unwillingness to follow the statute's text that causes this incoherence. *Camarillo*'s atextual holding that the government triggers the stop-time rule by serving notice that lacks hearing information risks unfairness because it allows the government to trigger the stop-time rule by serving notice of a hearing the government *never* schedules. To avoid this unfairness, *Ordaz* adopted a *further* atextual interpretation of the statute, focusing on whether the government files the notice with the immigration court—an event referenced nowhere in the statute. The statute itself avoids these problems: Under the statute's plain text, service of a notice like that in *Ordaz*—which stated that the hearing would be "at a date, time, and location to be determined," 26 I. & N. Dec. at 637—does not trigger the stop-time rule until (and unless) the government schedules, and provides notice of, an actual removal hearing.

This Court should return the inquiry to what the *statute* requires, and hold that only notice that satisfies section 1229(a)'s definition of a "notice to appear" triggers the stop-time rule as a "notice to appear under section 1229(a)."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DAVID J. ZIMMER
ALEXANDRA LU
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210

JEFFREY B. RUBIN
TODD C. POMERLEAU
RUBIN POMERLEAU PC
3 Center Plaza, Ste. 400
Boston, MA 02108

WILLIAM M. JAY
Counsel of Record
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinlaw.com
(202) 346-4000

Counsel for Petitioner

No. 17-459

IN THE

Supreme Court of the United States

WESCLEY FONSECA PEREIRA,
Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR *AMICI CURIAE* THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND THE IMMIGRANT DEFENSE PROJECT IN SUPPORT OF PETITIONER

BRADLEY N. GARCIA
(*Counsel of Record*)
bgarcia@omm.com
JEREMY MALTBY
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

The American Immigration Lawyers Association ("AILA") is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security ("DHS"), immigration courts, and the Board of Immigration Appeals ("BIA"), as well as before the United States District Courts, Courts of Appeals, and this Court.

The Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants having contact with the criminal legal and immigration detention and deportation systems. IDP seeks to improve the quality of justice for immigrants and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens the full benefit of their constitutional

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), timely notice was provided to counsel of record for all parties, and this brief is accompanied by the written consent of all parties.

and statutory rights. IDP has submitted *amicus curiae* briefs in many key cases before this Court and Courts of Appeals involving the rights of immigrants in the criminal legal and immigration systems. *See, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Vartelas v. Holder*, 566 U.S. 257 (2012); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *INS v. St. Cyr*, 533 U.S. 289, 322–23 (2001) (citing IDP brief).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici respectfully submit this brief to highlight important aspects of the statutory and legislative history of the governing law that the BIA, the court below, and respondent have either ignored or misconstrued.

The "stop-time" rule at issue in this case determines whether many noncitizens facing deportation after years of residence in the United States are eligible for a discretionary form of relief called "cancellation of removal." Such relief is open only to the most deserving of applicants. To be eligible, a noncitizen who is not a lawful permanent resident must show that he is a person of "good moral character"; that he has not been convicted of any of a broad range of criminal offenses; that he has an immediate family member who is a U.S. citizen or lawful permanent resident who would suffer "exceptional and extremely unusual hardship" if he were deported; and, finally, that he has maintained a ten-year period of continuous residence in the United States. 8 U.S.C. § 1229b(b)(1).

The "stop-time" rule was created as part of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 and governs when this ten-year period of continuous residence ends. The statute provides that the period ends upon service of a specific document: a "notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). And Section 1229(a) requires that this document "shall" specify a list of information about the nature of the impending removal proceedings, including the "time and place at which the proceedings will be held." *Id.* § 1229(a)(1)(G).

As the petitioner's brief details, the plain language of the statute is unambiguous and unequivocal: To trigger the stop-time rule, the government must serve a notice to appear that contains specific information required by the statute, including the time and place of removal proceedings. That is, the "notice to appear" must, unsurprisingly, inform the noncitizen when and where to appear. Accordingly, the incomplete document the government served on petitioner, that—in accordance with all-too-common government practice—failed to include the time and place of his removal proceedings, was not a "notice to appear under section 1229(a)" for purposes of triggering the stop-time rule or any other provision of the INA.

Instead of following the plain text of the statute, the court below deferred to the BIA's atextual interpretation, which permits the service of *any document* to trigger the rule, even if the document contains none of the information required by statute to be included in a "notice to appear under section 1229(a)."

The BIA justified its approach by reference to the "statutory structure," its interpretation of the legislative history, and administrative concerns.

Each of the BIA's justifications is entirely arbitrary and meritless on its own terms—but as this brief highlights, the BIA's approach also ignores the history of the statutory sections at issue, and the 1996 Act's relevant legislative history. Before 1996, the INA did not provide for a document called a "notice to appear" to initiate removal proceedings.[2] Instead, it provided for one document referred to as an "order to show cause," and a *separate document* specifically titled a "notice of time and place of proceedings." The statute thus expressly permitted the government to issue one notice with a subset of pertinent information, and then to send a separate notice communicating the time and place of proceedings. The *only change* IIRIRA made to those statutory provisions was to require all of the very same information to be provided in a *single document*, rather than two.

The legislative history confirms that Congress was concerned that errors and complexities in the pre-1996 system of providing notice of impending proceedings had led to intolerable confusion and delay. Congress's solution was just what the text and history of the statute suggest: to require a "single form of notice" to initiate removal proceedings. H.R. Rep. 104-469(I), 1996 WL 168955 at *159.

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[2] Prior to 1996, the proceedings at issue here were referred to as "deportation proceedings"; they are now termed "removal proceedings." For simplicity this brief refers to "removal proceedings" throughout.

The government's primary argument in support of the BIA's approach is that IIRIRA's legislative history shows that Congress created the stop-time rule to address concerns that some immigrants were intentionally delaying proceedings in order to accrue ten years of continuous residence. That is true, but utterly irrelevant to the question at issue in this case. The existence of a stop-time rule based on the government's service of a notice to appear eliminates any possibility of immigrant-caused delays. The question at issue is what *type of notice* is required, and regardless of the outcome of this case, *the government* is wholly in control of the timing and type of notice it issues and therefore when the period of continuous residence ends. And every relevant indicator of Congress's intent concerning the requisite type of notice unambiguously confirms that a notice to appear must be a single notice that includes all the information a noncitizen needs to know at the outset, including when and where to appear. The government's contrary approach simply seeks to cling to the piecemeal notice system permitted under the prior legislative scheme, recreating the very inefficiencies and confusion that Congress specifically sought to eliminate in 1996 by requiring a single, comprehensive form of notice.

A document that does not inform a noncitizen of all the information required by statute, including the "time and place at which the proceedings will be held," is not a "notice to appear under § 1229(a)."

The decision below should be reversed.

ARGUMENT

I. THE STATUTORY AND LEGISLATIVE HISTORY OF IIRIRA CONFIRM THE TEXT'S REQUIREMENT THAT THE DATE AND TIME OF REMOVAL PROCEEDINGS BE INCLUDED IN A NOTICE TO APPEAR

A. The Plain Text Of The INA Requires A Notice To Appear To Include The Date And Time Of Removal Proceedings In Order To Trigger The Stop-Time Rule

On its face, the text of the INA demonstrates that to trigger the stop-time rule, a notice to appear must contain the date and time of removal proceedings.

As noted above, one requirement for eligibility for cancellation of removal is that a noncitizen must have "been physically present in the United States for a continuous period of not less than 10 years immediately preceding the" cancellation application. 8 U.S.C. § 1229b(b)(1)(A). Under the stop-time rule, that period of continuous residence ends upon service of a single, specific document: a "notice to appear under section 1229(a)." *Id.* § 1229b(d)(1).[3] Sec-

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[3] Section 1229b(d)(1) also provides that the stop-time rule is triggered when an immigrant commits certain enumerated crimes. Specifically, continuous residence is deemed to end upon service of the "notice to appear under 1229(a)" or "when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title." 8 U.S.C. § 1229b(d)(1). This portion of the provision is not at issue in this case, but it provides support for petitioner's reading of the stop-time rule. It makes no sense to read out the

tion 1229(a), in turn, defines a "notice to appear" as a "written notice . . . specifying" certain information, including the "time and place at which the proceedings will be held." *Id.* § 1229(a)(1)(A)-(G). Thus, Congress provided in § 1229(a) for a single "notice to appear" containing all information relevant to the newly-initiated removal proceedings, whose receipt by a noncitizen terminates his period of continuous residence.

The question of statutory interpretation at issue in this case is straightforward: whether the government can trigger the stop-time rule, cutting off a noncitizen's period of continuous residence, by serving a purported "notice to appear" that *lacks* a central element of section 1229(a)'s statutorily mandated definition of what constitutes a notice to appear. The plain text of § 1229b(d)(1) provides a clear answer: the government can only effectively trigger the stop-time rule by serving a "notice to appear *under section 1229(a)*." *Id.* § 1229b(d)(1) (emphasis added). And section 1229(a) plainly defines a "notice to appear" as a document that "shall" contain every piece of information Congress deemed relevant to the initiation of removal proceedings, including the "time and place at which the proceedings will be held." *Id.* § 1229(a)(1)(G). There is no ambiguity. A document that does not inform a noncitizen of the "time and place at which the proceedings will be held" is not a "notice to appear under § 1229(a)." Indeed, a document lacking that information fails to

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substantive content of one statutorily enumerated provision ("under section 1229(a)") but continue to give weight to others in the same statute ("referred to in section 1182(a)(2)").

convey the one thing that would seem most central to any document titled a "notice to appear," namely, *when and where to appear*.

"Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise." *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in judgment) (collecting cases for the "venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity"). The plain text of the statute requires reversal.

B. Statutory History Confirms That Congress Intended For The Notice To Appear To Be A Single Document Including Date And Time Of Proceedings

The plain meaning of the text—that Congress intended for the government to issue a single "notice to appear" with all relevant information the noncitizen requires regarding his removal proceedings, specifically including the date and time of proceedings—is confirmed by the statutory history. Prior to the enactment of IIRIRA in 1996, the governing statute clearly provided for two separate notices regarding the initiation of removal proceedings.

The statute first provided for a notice called an "Order to show cause," which was required to include much of the information in the current § 1229(a), including "[t]he nature of the proceedings against the alien," "[t]he legal authority under which the proceedings are conducted," "[t]he acts or conduct al-

leged to be in violation of law," "[t]he charges against the alien and the statutory provisions alleged to have been violated," that "[t]he alien may be represented by counsel," "[t]he requirement that the alien must immediately provide (or have provided) the Attorney General with a written record" of their contact information and any change in that contact information, and "[t]he consequences . . . of failure to provide" such information. 8 U.S.C. § 1252b(a)(1)(A)-(F) (repealed 1996). But the order to show cause was *not* required to include the time and date of proceedings.

Instead, in a second, separate subsection, the statute explicitly provided for a second type of notice: a "Notice of time and place of proceedings." 8 U.S.C. § 1252b(a)(2) (repealed 1996). That notice was required to convey "the time and place at which the proceedings will be held," and the consequences of failing to appear. *Id.* The government was permitted, but not required, to combine that document with the order to show cause. *Id.* § 1252b(a)(2)(A) (repealed in 1996) (notice of time and place to be provided "in the order to show cause *or otherwise*" (emphasis added)); *see also Santos-Quiroa v. Lynch*, 816 F.3d 160, 162 n.2 (1st Cir. 2016) ("Although it could do so, an [order to show cause] did not have to set forth the hearing date, notice of which could be sent separately."). The statute also provided certain requirements for "[e]ach order to show cause *or other notice under this subsection*," confirming again that the statute contemplated separate notices. 8 U.S.C. § 1252b(a)(3) (repealed 1996) (emphasis added).

When Congress passed IIRIRA, it directly replaced the two separate notices with a single notice, the "notice to appear." The statute now requires the notice to appear to contain *all* of the exact same information that was required in an "order to show cause," *compare id.* § 1252b(a)(1)(A)-(F) (repealed 1996), *with id.* § 1229(a)(1)(A)-(F), but also contains one conspicuous change: IIRIRA *deletes* the separate subsection providing for a "notice of time and place of proceedings" and instead requires that the "time and place at which the proceedings will be held" be included in the single notice to appear. *Id.* § 1229(a)(1)(G). The amendment, in other words, condensed the dual-notice structure of the prior scheme into a single notice that now *explicitly requires* the date and time to be included along with all of the preexisting requirements. IIRIRA made what was optional in the order to show cause a requirement for a notice to appear.

Indeed, the government itself appeared to recognize that requirement initially: When it updated its form order to show cause to be a "notice to appear" in compliance with IIRIRA, the government added a space for the time and place of hearing to be entered. *Compare* Department of Justice, INS Order to Show Cause and Notice of Hearing Form I-221, https://www.justice.gov/eoir/ins-order-show-cause-and-notice-hearing-form-i-221 (lacking a field for date and time) *with* Department of Justice, DHS Notice to Appear Form I-862, https://www.justice.gov/eoir/dhs-notice-appear-form-i-862 (containing a field for the date and time). Yet

in practice the government simply leaves that space blank.

Congress's change in the statutory structure was presumptively deliberate and intended to effect real change, particularly given that it was the only change in an otherwise identical provision. *See Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."); *compare* 8 U.S.C. § 1252b(a)(1)(A)-(F) (repealed 1996), *with id.* § 1229(a)(1)(A)-(G). And the change confirms again the plain language of the statute: Congress explicitly and deliberately required a single document to initiate removal proceedings properly, and that document must contain the date and time those proceedings will commence. The statutory history therefore further refutes any suggestion that the statute is ambiguous on this point. If Congress wanted to allow the government to provide notice of date and time of the removal hearing separately from the notice to appear, it could have said so. Indeed, Congress conspicuously removed from the pre-IIRIRA statute language permitting just that approach. That statutory history confirms the plain text's command that a notice to appear must be a single document containing the date and time of proceedings.

C. Legislative History Confirms That Congress Deliberately Required A Single Notice Including All Relevant Information

The legislative history of IIRIRA confirms again that Congress's decision to require a single form of

notice to initiate removal proceedings, as opposed to the multiple-notice regime that previously prevailed, was deliberate, purposeful, and designed to foreclose the type of government practice at issue in this case.

One of Congress's primary aims in enacting IIRIRA was to streamline and simplify removal proceedings. *See, e.g.*, H.R. Rep. 104-469(I), 1996 WL 168955 at *157 (describing reform of removal procedures as "streamlin[ing] rules and procedures . . . to make it easier to deny admission to inadmissible aliens and easier to remove deportable aliens"). That aim manifested in several areas of the statute. For example, Congress combined various forms of proceedings into a single form of proceeding called "removal." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 349-50 (2005). Congress also limited judicial review of those proceedings. *See INS v. St. Cyr*, 533 U.S. 289, 297 (2001).

Congress's choice to replace the dual-notice system and to instead require the government to provide all of the information related to a noncitizen's removal proceedings in a single notice was another specific manifestation of that general goal of streamlining and simplifying removal proceedings. Part of Congress's goal in passing the statute was to reduce administrative inefficiency and delay. For example, during a hearing concerning potential reforms, Representative Lamar Smith voiced the need to "encourage changes that need to be made at the INS and EOIR to make our removal system credible" and "look at legislative reforms to streamline the removal process." *Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and*

Claims, 104th Cong. 1 (1995) (statement of Chairman Lamar Smith); *see also* 142 Cong. Rec. H2374 (March 19, 1996) (statement of Rep. Dreier) (highlighting the need to "[s]treamline [the] deportation process to reduce time to process cases").

Congress was concerned, in part, with procedural issues in notifying immigrants about hearings that led to delays in proceedings and immigration judges declining to order removal of immigrants who failed to appear for hearings. A report of the Judiciary Committee of the House of Representatives outlined several procedural issues that the legislation would address, including the fact that "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings [have led] some immigration judges to decline to exercise their authority to order an alien deported in absentia." H.R. Rep. 104-469(I), 1996 WL 168955 at *122. Such lapses were due in large part to the piecemeal notice system in place prior to IIRIRA, and judges' resulting hesitance in issuing in absentia orders could only have been a result of legitimate concerns that immigrants did not receive adequate notice of their hearing.

In order to address these concerns, Congress replaced the preexisting dual-notice system with a single notice to appear that must contain all required information in one document. The House Judiciary Committee Report described the proposed legislative reforms, including the specific change from the old older to show cause scheme to the new notice to appear statute, as follows: "[Section 1229] also will simplify procedures for initiating removal proceedings against an alien. *There will be a single form of*

notice. . . ." H.R. Rep. 104-469(I), 1996 WL 168955 at *159 (emphasis added). Congress's concern over procedural delays thus motivated its choice to streamline the multiple initiating notices into a single document.

To be sure, Congress also created the stop-time rule itself as part of IIRIRA to address concern over immigrants drawing out hearings in order to accrue the requisite continuous residency to qualify for relief from removal. *See, e.g.*, H.R. Rep. 104-469(I), 1996 WL 168955 at *122 (describing attempts by noncitizens "to delay proceedings" for that purpose); Paul B. Hunker III, *Cancellation of Removal or Cancellation of Relief? The 1996 IIRIRA Amendments: A Review and Critique of Section 240A(a) of the Immigration and Nationality Act*, 15 GEO. IMMIGR. L.J. 1, 2 (2000) ("Congress enacted the 'stop-time' rule because of dilatory tactics employed by aliens in acquiring the minimum period of residence necessary for relief eligibility."). But as explained *infra* at Part II.C, although the government has relied on that general congressional purpose for creating the stop-time rule, that purpose has nothing to do with the issue in this case. Here, the question is what *type of notice* suffices to trigger that stop-time rule. There is now a stop-time rule, whose operation the government controls entirely. And the only legislative history pertinent to the actual question in this case is the material just discussed, which confirms that Congress also intended to impose new procedures *on the government* in order to improve efficiency and streamline the overall hearing process, including by specifically requiring the government to provide a

single form of notice to initiate removal proceedings. Indeed, in requiring the government to serve a single notice, Congress recognized that part of streamlining removal meant ensuring that immigrants had all the relevant information necessary in a single document to seek advice and then to prepare for and attend their removal proceedings.

This legislative history thus reaffirms the clear text of the statute: Congress intended for the notice to appear to be a single document containing all relevant hearing information, including the date and time of proceedings.

II. THE RULE ENDORSED BY THE COURT BELOW IS INCORRECT

For all of the foregoing reasons, the First Circuit's conclusion that the statute was ambiguous, and therefore that the BIA's reading was entitled to deference, was erroneous. The statutory text and other interpretive guides confirm beyond any doubt that to initiate removal proceedings and trigger the stop-time rule, the government most serve a notice containing all of the statutorily required components of a "notice to appear under section 1229(a)." Because there is no ambiguity—even without resort to other important interpretive tools such as the rule requiring that ambiguities in removal statutes be construed in favor of aliens—the BIA is not entitled to deference. *See, e.g., Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (*citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

The specific arguments the First Circuit and BIA advanced in support of the contrary result are all severely misguided.

A. The First Circuit Improperly Concluded That The Statutory Text And Structure Create An Ambiguity

1. The BIA relied on a puzzling misreading of the clear text of the INA to conclude that the statute is ambiguous. The BIA reasoned that while it is "plausible" that the phrase "notice to appear" under section 1229(a) means that a notice must contain all of the statutorily enumerated requirements to trigger the stop-time rule, it also could be "simply definitional." *Matter of Camarillo*, 25 I. & N. Dec. 644, 647 (BIA 2011). That is, the BIA read § 1229b(d)(1) as merely "specif[ying] the document the DHS must serve on the alien to trigger the 'stop-time' rule," but not imposing *any* "substantive requirements for a notice to appear to be effective in order for that trigger to occur." *Id.* The First Circuit summarily agreed that the language was ambiguous, holding that § 1229b(d)(1)'s "reference to a notice to appear 'under' § 1229(a) does not clearly indicate whether the rule incorporates the requirements of that section." Pet. App. 9a. Of course, that is precisely what § 1229b(d)(1) does: It "clearly indicate[s]," *id.*, that in order to trigger the stop-time rule, the government must serve a notice to appear "*under* 1229(a)," that is, a notice to appear as defined by that section. 8 U.S.C. § 1229b(d)(1) (emphasis added). There would have been no reason to specify that the stop-time rule is triggered by service of a "notice to appear under section 1229(a)"—as opposed to, say, "a

notice"—if the statute were in fact satisfied by the service of any document at all.

Indeed, the BIA's reading unavoidably leads to just that absurd result, further indicating that it is contrary to Congress's intent. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) ("Some applications of respondents' position would produce results that were not merely odd, but positively absurd. . . . We do not assume that Congress, in passing laws, intended such results.") (internal citations omitted). Because the government's interpretation reads the "specifying" clause out of the statute, it necessarily means that a "written notice" of *anything or nothing at all* could qualify as a "notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). The Third Circuit raised this issue, noting that "[t]aken to its logical conclusion, the agency's approach might treat even a 'notice to appear' containing no information whatsoever as a 'stop-time' trigger, permitting the government to fill in the blanks (or not) at some unknown time in the future." *Orozco-Velasquez v. Lynch*, 817 F.3d 78, 84 (3d Cir. 2016).

The court of appeals below dismissed this concern in a footnote, suggesting that though "this case does not require [the court] to define the boundaries of [their] deference to the agency's statutory construction," *some* of the information "specified" in section 1229(a) might be required in order to trigger the stop-time rule, just not the date and time of the removal hearing. Pet. App. 8a-9a n.5. This suggestion is meritless: The "specifying" clause either has force or not, and both the plain text of the statute and common sense dictate that it does. That the BIA's

reading has unavoidable implications so absurd that the First Circuit realized the necessity of disclaiming them, but could offer no rationale whatsoever for doing so, is reason enough to reverse the decision below.

2. The BIA and the First Circuit also pointed to the "statutory structure," and in particular the purported "breadth" of § 1229b(d)(1)'s "reference to the entirety of" § 1229(a) rather than specifically to § 1229(a)(1). *Camarillo*, 25 I. & N. Dec. at 647. Section 1229(a)(1) defines the necessary requirements for a notice to appear, including the date and time. 8 U.S.C. § 1229(a)(1). But the BIA asserted that because § 1229(a) also includes § 1229(a)(2), which "outlin[es] the procedures to follow when notice must be given of" *changes* in the date and time, the stop-time rule should not be read to refer to the substantive requirements of 1229(a)(1). *Camarillo*, 25 I. & N. Dec. at 647-48.

The conclusion simply does not follow from the premise. Although the stop-time rule refers to § 1229(a) generally, it specifically states that the time of accrual of physical presence "shall be deemed to end ... when the alien is served *a notice to appear*." 8 U.S.C. § 1229b(d)(1) (emphasis added). Section 1229(a)(1) defines a notice to appear. Section 1229(a)(2) does not. Section 1229(a)(2) governs only a "notice of *change* in time or place of proceedings," and is therefore irrelevant to the requirements for triggering the stop-time rule. The BIA also noted that "Congress envisioned that circumstances beyond the control of the DHS would require a change in the hearing date and specifically provided that

such notification could occur after the issuance of the notice to appear." *Camarillo*, 25 I. & N. Dec. at 648. True enough. But it does not follow that Congress thus did not intend for "a notice to appear under 1229(a)" to include all of the requirements specified in § 1229(a)(1) in order to trigger the stop-time rule. If anything, that Congress envisioned the potential for a *change* in date and time of which the government would have to provide notice indicates that Congress assumed the notice to appear would *already have communicated* an initial date and time.

Notably, although they did assert these misguided arguments about the "statutory structure," neither the court below nor the BIA addressed the statutory *history* of section 1229(a). As described *supra* in Part I.B, that history clearly confirms Congress's intent to unify the pre-existing, piecemeal notice structure and create a single notice to appear containing all the relevant hearing information.

B. "Administrative Context" Does Not Support The Government's Rule

The BIA next relied on what the court below called "administrative context," which includes DHS regulations and administrative practice, to support its counter-textual reading of the stop-time rule. According to the BIA, a DHS regulation "further supports [its] reading because it expressly provides that the time, place, and date of an initial removal hearing shall be provided in the notice to appear only where practicable." *Camarillo*, 25 I. & N. Dec. at 648 (internal quotations omitted); *see also* 8 C.F.R. § 1003.18(b). That regulation, however, is invalid, because it conflicts with the text of the INA, which *re-*

quires that a "notice to appear" specify the "time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i); *see also supra*, Part I.

Indeed, the regulation is an obvious attempt to preserve the specific feature of the pre-1996 regime that Congress specifically eliminated—namely that it allowed, but did not require, an order to show cause to include the date and time of an initial removal hearing. Notably, the regulatory language on which the government relies to justify its continued adherence to the piecemeal notice system was added only *after* Congress enacted IIRIRA and the requirement of a single, unified initiation notice. *Compare* Aliens and Nationality, Rules of Procedure for Proceedings Before Immigration Judges, 52 Fed. Reg. 2931 (1987), *with* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312 (1997). The government cannot circumvent a statutory command simply by enacting a regulation that defies it.

The BIA and the First Circuit also asserted that the government's administrative practices supported its interpretation of the statute. "While DHS drafts and serves the notice to appear," the First Circuit explained, "the immigration court sets the date and time of the hearing." Pet. App. 12a; *see also* 8 C.F.R. § 1003.18(a). As a result, the BIA noted, "DHS frequently serves [notices to appear] where there is no immediate access to docketing information," so "it is often not practical to include the date and time of the initial removal hearing on the notice to appear." *Camarillo*, 25 I. & N. Dec. at 648 (internal quotation

and citation omitted). The court below concluded that "[a]n interpretation of the statute that allows the stop-time rule to take effect without requiring separate action by the immigration courts would, therefore, accommodate these practical constraints." Pet. App. 12a.

Those observations provide no justification for the government's rule. First, administrative practices that contravene Congress's clear directives are just as irrelevant as a regulation that does so. Further, for these asserted "practical constraints" to be relevant to interpreting the statute, there must at least be some basis to believe Congress could have foreseen them. But that is simply not the case here.

As BIA noted, DHS frequently serves notices to appear "where there is no immediate access to docketing information," *Camarillo*, 25 I. & N. Dec. at 648 (internal quotation and citation omitted), because the date and time of the hearing is set by the immigration courts, a separate entity—the Executive Office for Immigration Review—housed in a separate agency—the Department of Justice. But this split did not occur until 2003, when Congress created the Department of Homeland Security, disbanded the Immigration and Naturalization Service (INS), and moved the INS's enforcement and removal operations over to DHS. *See* Homeland Security Act of 2002, Pub. L. 107–296, 116 Stat. 2135. When Congress passed IIRIRA in 1996, the enforcement and removal operations of DHS were functions of the INS, which was, at the time, part of the same agency as the immigration courts. In other words, the

"practical concerns" the government cites *did not exist* when Congress passed IIRIRA in 1996.

Even if such administrative concerns were relevant to the interpretation of the stop-time rule, they are surely surmountable. Practical experience and common sense confirm that government agencies are able to coordinate with one another to serve a notice of judicial proceedings with a time and place for a hearing, from parking ticket enforcement agencies to police departments issuing summons. DHS—a federal agency with a discretionary budget of more than $42 billion[4]—should be able to do the same.

C. The Government's Rule Is Contrary To The Legislative History And Reintroduces Precisely The Problem Congress Aimed To Cure In The 1996 Reform

1. *The court below relied on legislative history that actually contradicts its conclusion.*

The court below recounts BIA's reliance on legislative history showing that the stop-time rule was created in response to concern over immigrants delaying removal proceedings in order to accrue sufficient continuous residency to be eligible for relief from removal. Pet. App. 12a-13a.

That legislative history is entirely irrelevant to the question in this case, which is not whether there

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[4] Department of Homeland Security, Fact Sheet: The Fiscal Year 2017 Budget (May 15, 2017), https://www.dhs.gov/news/2017/05/15/fact-sheet-fiscal-year-2017-budget-0.

should be a stop-time rule—because of IIRIRA, there is—but rather what type of notice should *trigger* that rule. The stop-time rule was indeed designed to prevent immigrants from delaying removal proceedings in the hopes of satisfying the requisite period of continuous residency. *Id.*; *see also supra* Part I.C. But petitioner's rule does not allow immigrant-caused delay, and the government's rule does nothing to prevent it—whoever wins this case, *the government* is entirely in control of when the continuous residence clock stops. Under either party's approach, the government's actions alone determine when the stop-time rule is triggered. The BIA disregarded the clear text of the statute—requiring a single, complete notice to appear in order to trigger the stop-time rule—to address a problem that was already solved.

The appropriate rule should, however, reflect Congress's overarching purpose in enacting IIRIRA: to address concerns over delay and inefficiency in removal proceedings more broadly. The court below correctly noted that "[t]he legislative history reflects Congress's concern about delay and inefficiency in the immigration process that it sought to address through the enactment of IIRIRA." Pet. App. 13a. Indeed, the court below highlighted the House Judiciary Committee Report described above, which notes how "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings [had led] some immigration judges to decline to exercise their authority to order an alien deported in absentia." *Id.* (quoting H.R. Rep. 104-469(I), 1996 WL 168955 at *122.) The court then noted, however,

that "[t]he creation of the 'notice to appear' was intended to prevent 'protracted disputes concerning whether an alien has been provided proper notice of a proceeding' *by informing aliens that they are required to notify the government of any changes in their contact information.*" *Id.* at 13a-14a (emphasis added). But that cannot have been the purpose of the new "notice to appear," because orders to show cause were *already required* to tell immigrants the very same thing. 8 U.S.C. § 1252b(a)(1) (repealed 1996). What the pre-IIRIRA statute did *not* include, that IIRIRA explicitly added, was the requirement that the notice to appear contain the date and time of proceedings. *See supra* Part I.B. Thus, the legislative history indicates that Congress intended to prevent protracted disputes concerning proper notice by creating a single, streamlined notice process that includes the date and time of proceedings.

2. *The government's rule reintroduces precisely the problem the 1996 reform was designed to solve.*

The court below concluded that "[g]iven Congress's intent in enacting IIRIRA to prevent notice problems from dragging out the deportation process, it would make little sense for Congress to have created the potential for further delays by conditioning the activation of the stop-time rule on the receipt of a hearing notice that may come months, or even years, after the initiation of deportation proceedings by DHS." Pet. App. 14a. That reasoning is backwards. Given Congress's desire "to prevent notice problems from dragging out the deportation process," *id.*, it would make little sense for Congress to have

endorsed a rule *that would do just that*. The government's rule creates perverse incentives that encourage the government to drag out the removal process: If the government can stop the clock on the continuous residence requirement by sending a document without a hearing date, it reduces the imperative to calendar matters and move the process along. That incentive to delay is especially concerning in light of the absence of any legal requirement ensuring prompt proceedings: Unlike in the criminal context, where the Speedy Trial Act ensures prompt prosecution of charges, *see* 18 U.S.C. §§ 3161-3174, and unlike in litigation governed by the Federal Rules of Civil Procedure, immigration law provides no assurance that the government will carry removal proceedings forward expeditiously.

In short, the BIA's approach is itself directly at odds with Congress's general intent to streamline and expedite the removal process. That approach does nothing at all to serve that intent, but instead simply penalizes deserving immigrants for *the government's delay* and failure to provide the unified, adequate notice required by the statute. If the government were to follow the plain command of the statute, that in itself would expedite the removal process: The statute provides incentives to timely calendar removal hearings in order to provide the unified notice required by statute to trigger the stop-time rule.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

BRADLEY N. GARCIA
(*Counsel of Record*)
bgarcia@omm.com
JEREMY MALTBY
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Amici Curiae

February 28, 2018

No. 17-459

IN THE
Supreme Court of the United States

WESCLEY FONSECA PEREIRA,
Petitioner,

v.

JEFFERSON B. SESSIONS III,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE NATIONAL IMMIGRANT JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

CHARLES ROTH
NATIONAL IMMIGRANT JUSTICE CENTER
208 S. LaSalle
Suite 1818
Chicago, IL 60604
(312) 660-1613

LINDSAY C. HARRISON
Counsel of Record
ZACHARY C. SCHAUF
JONATHAN A. LANGLINAIS
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
lharrison@jenner.com

QUESTION PRESENTED

The Attorney General can cancel removal of certain immigrants under 8 U.S.C. § 1229b(a) and (b). To be eligible for cancellation of removal, a non-permanent resident must have ten years of continuous presence in the United States, and a permanent resident must have seven years of continuous residence. *Id.* § 1229b(a)(2), (b)(1)(A). Under the "stop-time rule," those periods end when the government serves a "notice to appear under section 1229(a) of this title." *Id.* § 1229b(d)(1)(A). Section 1229(a) defines a "notice to appear" as "written notice ... specifying" certain information, including "[t]he time and place at which the proceedings will be held." *Id.* § 1229(a)(1).

The question presented is:

Whether, to trigger the stop-time rule by serving a "notice to appear under section 1229(a)," the government must "specify" the items listed in § 1229(a)'s definition of a "notice to appear," including "[t]he time and place at which the proceedings will be held."

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

This case concerns the mechanics of cancellation of removal. This relief "was designed to accomplish a humanitarian result." *INS v. Errico*, 385 U.S. 214, 225 (1966). It avoids the unduly harsh consequences that removal can yield and protects citizens who would suffer if an immigrant were removed. Reserved for the most deserving cases, this relief—as relevant here—is available only to non-permanent residents who have resided in this country for 10 years, who have good moral character, and for whom removal would be an "exceptional and extremely unusual hardship" for family members who are U.S. citizens. 8 U.S.C. § 1229b(b)(1)(A)-(D). And this relief is discretionary. Eligible immigrants are entitled to the chance to *apply*, but the government has discretion to deny relief.

The law governing eligibility for cancellation is overseen, in the first instance, by the Board of Immigration Appeals ("BIA"), which interprets and applies the governing statutes and rules subject to review by courts of appeals under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *see Esquivel-Quintana v. Sessions*, 137 S. Ct.

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[1] Pursuant to this Court's Rule 37.3(a), counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

1562, 1567 (2017). Judicial review of the BIA's decisions is critical to ensure that immigrants whom Congress directed would be eligible for relief *in fact* receive the chance to apply.

Below, the First Circuit blessed an interpretation that excludes Petitioner Wescley Fonseca Pereira from eligibility for cancellation. The "stop-time" rule halts an immigrant's period of residency in the United States, potentially precluding him or her from eligibility, when the government serves a "notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). The First Circuit approved the BIA's interpretation that the government can use this tool to trigger the stop-time rule by issuing documents captioned "notice to appear" that *do not* contain the information required by § 1229(a). With this license, the government today routinely—and deliberately—issues notices omitting this required information.

Amicus agrees with Pereira that the BIA's interpretation is not entitled to deference. It violates the statute's clear text. It badly undermines cancellation's critical humanitarian purposes. And it does not advance Congress's limited intent in enacting the stop-time rule. That rule avoids the risk, present under prior law, that immigrants could game the system by delaying proceedings until they became eligible for relief. Thus, issuance of a lawful notice to appear now precludes immigrants from accruing time, even if proceedings drag on. Congress did not, however, enact the stop-time rule to give the government the chance to manipulate the rules by issuing notices that do not

comply with the statute yet treating them as triggering the stop-time rule.

Amicus submits this brief to draw the Court's attention to a broader concern: that in immigration cases, circuit courts have repeatedly failed to apply *Chevron*'s framework with the rigor this Court's precedents demand. At Step 1, the First Circuit ended its inquiry after concluding that the statute did not, in express terms, spell out an answer to the narrow question raised by this case—whether the BIA can decide that documents that do not meet the statute's requirements for notices to appear nontheless *function* as notices to appear for purposes of the stop-time rule. And the decision below does not stand alone in this approach. *Amicus* is concerned that other circuit courts, too, have pretermitted their Step 1 inquiry the moment they perceive any hint of textual doubt, without applying all the traditional tools of construction to resolve that doubt, as this Court's cases command. This has continued to occur, moreover, despite a slew of decisions from this Court modeling the careful analysis Step 1 requires. *Amicus* thus urges the Court to use this case as an opportunity to underscore the importance of rigorous statutory interpretation at Step 1.

Likewise, *Amicus* is concerned that, at Step 2, circuit courts then fail to consider whether the BIA's interpretation comports with the purposes of the immigration laws, despite *Judulang*'s admonition that the BIA may not adopt interpretations "unmoored from the purposes and concerns of the immigration laws." 565 U.S. 42, 64 (2011). The immigration laws are harsh enough without the BIA enacting *further* draconian

barriers that are grounded in neither statutory text nor the purposes of the immigration laws.

Amicus has a deep understanding, and a significant interest, in correcting these errors. The National Immigrant Justice Center ("NIJC") is a program of the Heartland Alliance for Human Needs and Human Rights, a non-profit corporation headquartered in Chicago, Illinois. NIJC is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers. By partnering with more than 1,000 attorneys from the Nation's leading law firms, NIJC provides direct legal services to approximately 8,000 individuals annually. This experience informs NIJC's advocacy, litigation, and educational initiatives, as it promotes human rights on a local, regional, national, and international stage. NIJC has a substantial interest in the issue now before the Court, both as an advocate for the rights of immigrants generally and as the leader of a network of pro bono attorneys who regularly represent immigrants.

SUMMARY OF ARGUMENT

When the courts of appeals review BIA decisions, they carry out their Article III-imposed "duty ... to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Today, courts frequently carry out that duty using the two-step framework of *Chevron*. But in a number of cases, including here, the judicial deference that *Chevron* prescribes has become a judicial abdictation that the Constitution forbids. *Amicus* urges the Court to reverse, and in so doing, to make clear to circuit courts the demanding inquiry *Chevron* requires at both steps.

I.A. At Step 1, First Circuit erred in two ways. First, the First Circuit believed it was enough to proceed to Step 2 that the statute's express terms did not "explicitly" state an answer to the question directly posed here—whether "the date and time of the hearing must be included in a notice to appear in order to cut off an alien's period of continuous physical presence." Pet. App. 9a. *Chevron*, however, does not require magic words. This Court has emphasized the need to use *all* traditional tools of construction—text, structure, purpose, legislative history, relevant canons of construction, and so on—and has applied these tools to rigorously police BIA interpretations at Step 1. The First Circuit's failure to apply those tools at Step 1 is especially troubling because it is no isolated error. Repeatedly, courts of appeals have failed to give BIA interpretations the scrutiny Step 1 requires.

B. Second, the First Circuit erred by failing to apply "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quotation marks omitted). This principle recognizes that deportation is among the harshest consequences the law can inflict, akin to banishment. And because this principle is a background presumption against which Congress legislates, it applies at Step 1.

II. At *Chevron* Step 2, the First Circuit erred again. *Judulang v. Holder* held that the BIA's interpretations are arbitrary and capricious, and fail at Step 2, if they are not tied to "the purposes and concerns of the immigration laws." 565 U.S. 42, 52 n.7, 64 (2011). This case concerns cancellation of removal and the stop-time

rule. Congress created cancellation to serve critical humanitarian purposes—to avoid unduly harsh consequences for the most deserving of cases. The stop-time rule, for its part, is a narrow limit on cancellation designed to prevent immigrants from gaming the system by delaying until they accrue the time required for eligibility. But here, the BIA's interpretation badly undermines cancellation's humanitarian purposes yet does not advance the stop-time rule's anti-gaming purpose. Because the BIA's interpretation is unmoored from the relevant purposes of the immigration laws, it fails at Step 2.

The First Circuit and the BIA erred by relying on "administrative context"—in short, that the government has promulgated a regulation authorizing "notices to appear" that do not contain hearing dates and times, which the government believes is more convenient. "[C]heapness alone cannot save an arbitrary agency policy." *Judulang*, 565 U.S. at 64. And BIA's reliance on "administrative context" is especially arbitrary because a system *exists* that would allow the government to include hearing dates and times on notices to appear. Even if it did not, the relevant players—the Department of Homeland Security and immigration courts—are both executive agencies. They have every ability to coordinate systems to provide the information Congress mandated. If they choose not to do so, they cannot complain that the stop-time rule does not apply until they *actually* provide this information.

ARGUMENT

I. At *Chevron* Step 1, the First Circuit erred by finding the statute ambiguous without applying the governing canons of construction.

If an immigrant has 10 years of continuous U.S. presence (for non-permanent residents) or 7 years of continuous residence (for permanent residents), he or she is entitled to apply for cancellation of removal, unless (as relevant here) the "stop-time rule" ends this period via service of "a notice to appear." 8 U.S.C. § 1229b(d)(1); *see id.* § 1229b(a)-(b). The notice to appear "shall" provide "written notice ... specifying" certain information, including "[t]he time and place at which the proceedings will be held." *Id.* § 1229(a)(1); *see Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("the mandatory 'shall,' ... normally creates an obligation impervious to ... discretion"). Nonetheless, the Department of Homeland Security ("DHS") has directed its vast bureaucracy to proceed on the premise that, to trigger the stop-time rule, notices to appear *need not* include this information. *See* 8 C.F.R. § 1003.18(b) (DHS will provide "time, place and date" only "where practicable"). So, when DHS serves a notice to appear that omits this information, as it did here, it is no clerical error or administrative snafu. It is DHS's deliberate and systematic choice.

Amicus agrees with Pereira that the statute unambiguously forecloses DHS's approach. An immigrant's clock stops only when he or she is "served a notice to appear *under section 1229(a)*." 8 U.S.C. § 1229b(d)(1) (emphasis added). And whatever label

DHS uses, a document is a notice to appear "under section 1229(a)," *id.*, only if it includes the information that section 1229(a) mandates that the "notice ... shall ... specify[]," including the hearing's date, place, and time, *id.* § 1229(a)(1). DHS cannot redefine by regulation statutory terms Congress has *already* defined. The Court should thus reverse.

But from *amicus*'s perspective, the errors in the First Circuit's method are also troubling. Its analysis at *Chevron* Step 1 consisted of a single slender page. Pet. App. 8a-9a. As explained below, the First Circuit's approach cannot be squared with the robust judicial oversight of questions of statutory interpretation that this Court's precedents demand. The First Circuit, however, is not the first court to abdicate this responsibility. In reversing, the Court should correct that error, which has continued in courts of appeals despite myriad decisions from this Court demonstrating the rigorous scrutiny *Chevron* requires.

A. The First Circuit erred by failing to apply the "traditional tools of statutory construction" at *Chevron* Step 1.

For the First Circuit, it was enough to proceed to *Chevron* Step 2 that the statute's express terms did not, in its view, "explicitly" state an answer to the question directly posed by this case—whether "the date and time of the hearing must be included in a notice to appear in order to cut off an alien's period of continuous physical presence." Pet. App. 9a. Thus, because the statute did not—via magic words—prohibit DHS from departing from the statute's command that the notice "shall" include this information, 8 U.S.C. § 1229(a)(1), the First

Circuit adjudged the statute "ambiguous" and "proceed[ed] to step two." Pet. App. 9a. Under this approach, any agency statutory interpretation will survive Step 1, and be judged under Step 2's reasonableness review, unless Congress has taken the extra step of telling the agency—in express terms—that the agency cannot adopt that interpretation.

That is not how *Chevron* Step 1 works, in immigration cases or any other. *Chevron* recognizes that the "judiciary is the final authority on issues of statutory construction." 467 U.S. at 843 n.9. And *Chevron*'s first step commands courts to use all the "traditional tools of statutory construction" to determine whether "'administrative constructions ... are contrary to clear congressional intent.'" *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987) (quoting *Chevron*, 467 U.S. at 843 n.9). Those traditional tools include not just the plain meaning of the narrowest textual phrase at issue, but also—among others—the statute's structure, context, history, purpose, and legislative history. *See id.* at 449.

This Court's decision in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), illustrates the point. The dispute there was whether the term "sexual abuse of a minor" included statutory rape offenses committed against any victim younger than 18 (as the government contended), or whether it covered solely offenses defined to require that the victim be younger than 16 (as the immigrant argued). *Id.* at 1568. The immigrant cited legal dictionaries to support his interpretation. *Id.* at 1569. But the government responded with a dictionary of its own. *Id.* at 1569-70. If any bare linguistic

ambiguity was enough to end the Step 1 inquiry, as the First Circuit appeared to believe, those clashing dictionaries should have sent the Court to Step 2. But the Court did something else. It looked to the "structure of the INA"; how the government's interpretation fit with a "closely related federal statute, 18 U.S.C. § 2243," and "evidence from state criminal codes." *Id.* at 1570. Based on this robust analysis, and myriad traditional tools of interpretation, the Court concluded that "the statute, read in context, unambiguously forecloses the Board's interpretation." *Id.* at 1572.

Esquivel-Quintana is only the most recent example of this Court's rigorous scrutiny. Sometimes that scrutiny finds the statute is clear; other times, it finds ambiguity. But always, the review is searching, employing the full panoply of tools of construction. For example, *Cardoza-Fonseca* rejected the BIA's request for deference based on the Court's "analysis of the plain language of the Act"; an "examination of its history," including the statute's "symmetry" with a "United Nations Protocol"; a piece of unenacted legislation; and the statute's "legislative history." 480 U.S. at 432, 441-43, 449. These "ordinary canons of statutory construction," the Court found, "compell[ed]" rejecting the BIA's interpretation. *Id.* at 449.

The Court's statutory analysis was just as rigorous in *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015). There, the BIA had decided that a state-court drug paraphernalia conviction can "relat[e] to" a federal controlled substance—triggering removal under 8 U.S.C. § 1227(a)(2)—even if the paraphernalia was not *used* for any controlled substance specified in federal law (but

instead for Adderall that was a controlled substance only under state law). 135 S. Ct. at 1984. The Court rejected BIA's interpretation based on an examination of "the statute's text"; its "historical background"; and the Court's conclusion that the BIA's interpretation made "scant sense" and led to "consequences Congress could not have intended," contradicting the rule that "[s]tatutes should be interpreted as a symmetrical and coherent regulatory scheme." *Id.* at 1989-90 (quotation marks omitted).[2]

In *Holder v. Martinez Gutierrez*, 566 U.S. 583 (2012), the Court reached the opposite result but based on the same exacting scrutiny. The Court looked to "the statute's text," its "history and context," and its "purposes"—deferring to the BIA only after concluding that the statute, read in light of all these tools, did not require a contrary result. *Id.* at 591-92, 594.

None of these cases can be squared with what the First Circuit did below. After the First Circuit's truncated analysis at *Chevron* Step 1, it addressed critical interpretive tools like "[s]tatutory [s]tructure" and "legislative history" only at Step 2. Pet. App. 10a, 12a. The First Circuit then misused these tools, but the

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[2] While the Court did not expressly say that it reached this conclusion at *Chevron* Step 1, that is the only sensible reading of the Court's opinion. If the Court had perceived an ambiguity, it should have remanded the case so that the BIA could exercise its interpretive discretion in light of this Court's guidance. *See Negusie v. Holder*, 555 U.S. 511, 517 (2009). But the Court simply reversed. *Compare Mellouli*, 135 S. Ct. at 1990-91 (reversing), *with Judulang*, 565 U.S. at 52 n.7, 64 (remanding after deeming the BIA's rule arbitrary and capricious).

key point for present purposes is that the First Circuit's entire approach was wrong.

Nor is this error merely a matter of "Same wine, different bottle." *Chevron*'s first step is about whether Congress's intent is "clear," *Cardoza-Fonseca*, 480 U.S. at 447-48 (quotation marks omitted), and the sources relevant there are sources that bear on Congress's intent. By contrast, *Chevron*'s second step asks whether "a particular agency interpretation is reasonable." *Negusie v. Holder*, 555 U.S. 511, 518 (2009). The First Circuit took this standard as license, at Step 2, to put weight on "[a]dministrative [c]ontext," Pet. App. 12a—namely, that the government has enacted a regulation specifying that, notwithstanding the statute, a notice to appear need include the "time, place and date of the initial removal hearing" only "where practicable." 8 C.F.R. § 1003.18(b). By relegating statutory structure and history to *Chevron* Step 2, the First Circuit short-circuited the inquiry into congressional intent, and it allowed these tools of interpretation (which *genuinely* bear on Congress's intended meaning) to be traded off against factors like "administrative context," convenience, and the like.

The First Circuit's error is especially troubling because it is not an isolated mistake. Despite this Court's clear guidance, decisions in the courts of appeals have repeatedly failed to rigorously analyze the indicia of Congress's intent using the "traditional tools of statutory construction." *Cardoza-Fonseca*, 480 U.S. at 448 (quotation marks omitted).

The other lower court opinions concerning the present split are a prime example. Their *Chevron* Step

1 analysis, like the First Circuit's, consists of just a few sparse sentences. *See, e.g., Yi Di Wang v. Holder*, 759 F.3d 670, 674 (7th Cir. 2014) (statute does not explicit say that "a Notice to Appear, in order to function for the stop-time rule, must include the date and time of a hearing"); *Guaman-Yuqui v. Lynch*, 786 F.3d 235, 238 (2d Cir. 2015) ("[t]he text of the stop-time rule does not clarify whether a notice to appear must comport with all of the procedural requirements contained in § 1229(a) in order to freeze an alien's period of continuous residence"); *Urbina v. Holder*, 745 F.3d 736, 740 (4th Cir. 2014) (stating, without elaboration, that "[a]s to the first step, we agree with the BIA that the relevant statutory provision is ambiguous"). Whatever one thinks about the *merits* of this case, Congress's intent deserves vastly more consideration than these courts provide.

This Court has repeatedly been called upon to abrogate circuit court decisions that shortchanged congressional intent in this manner. When the Seventh Circuit considered the issue this Court resolved in *Esquivel-Quintana*—whether "sexual abuse of a minor" includes statutory rape offenses committed against any victim younger than 18—its Step 1 analysis consisted, in its entirety, of the assertion that "§ 1101(a)(43)(A) is open-ended." *Velasco-Giron v. Holder*, 773 F.3d 774, 777 (7th Cir. 2014).[3] Just as terse was the opinion this Court

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[3] Even worse, the Seventh Circuit appeared to defer to the BIA on the Step 1 question of whether the statute was ambiguous in the first place. *See Velasco-Giron*, 773 F.3d at 777 (asserting that "*the Board was entitled to find* that Congress omitted a statutory reference from § 1101(a)(43)(A) precisely in order to leave

reversed in *Mellouli*, whose only Step 1 analysis was the observation that "the term 'relating to,' ... reflects congressional intent to broaden the reach of the removal provision." *Mellouli v. Holder*, 719 F.3d 995, 1000 (8th Cir. 2013).[4]

The correct approach was that employed by the Eleventh Circuit in *Jian Le Lin v. U.S. Attorney*

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discretion for the agency" (emphasis added) (quotation marks omitted)).

[4] Further examples come from the BIA's interpretation of the removal ground for a "crime of child abuse, child neglect, or child abandonment." 8 U.S.C. § 1227(a)(2)(E)(i). The BIA has held that this provision *also* authorizes removal based on conviction for "child endangerment"—a different, less serious crime against children that punishes conduct by any person that places a child at *some risk*. *Matter of Soram*, 25 I. & N. Dec. 378, 382 (B.I.A. 2010). When the Second Circuit weighed the BIA's interpretation, its Step 1 inquiry was limited to a terse paragraph whose analysis stopped after observing that "the statute does not define the term 'crime of child abuse,'" and that "state and federal statutes ... offer varied definitions." *Florez v. Holder*, 779 F.3d 207, 211 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1450 (2016) (citation omitted). The Third Circuit, applying the same provision, was even more spare:

> The crime of child abuse is not defined in the INA. Moreover, the meaning of the phrase, "crime of child abuse," as used in § 1227(a)(2)(E)(i) is not plain and unambiguous. We therefore must view the term as ambiguous, *i.e.*, requiring interpretation, and proceed to the second step of the *Chevron* inquiry.

Mondragon-Gonzalez v. Att'y Gen. of the U.S., No. 17-1710, — F. App'x —, 2018 WL 618467, at *2 (3d Cir. Jan. 29, 2018) (citation omitted). Nowhere to be found is the searching Step 1 inquiry into plain meaning, statutory structure, history, and purpose that this Court had recently modeled in *Esquivel-Quintana*.

General, 681 F.3d 1236, 1240-41 (11th Cir. 2012), which considered whether immigrants can file motions to reopen from outside the United States. *Id.* at 1237. The government argued there, like the First Circuit found here, that "because IIRIRA does not *specifically address* the issue of an alien's physical presence in the United States, Congress has not spoken to the issue and thus the Attorney General is free to regulate in the statutory gap." *Id.* at 1240 (emphasis added). The Eleventh Circuit rejected that overbroad view of *Chevron* deference and held that the BIA's interpretation flunked Step 1 based on negative inferences from the statute's text, clues from its history, and the broader statutory structure. *Id.* at 1240-41. But although opinions like *Jin Le Lin* apply the proper model for *Chevron* analysis, a problem remains. Hence, *amicus* respectfully suggests that, in reversing the decision below, the Court should underscore to circuit courts the rigorous scrutiny *Chevron* demands.

Guidance is especially warranted because this error, if left uncorrected, will affect more than the immigration laws. The *Chevron* framework applies across the entire domain of the administrative state. *Cf. United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 487-88 (2012) (relying on *Cardoza-Fonseca* to define scope of deference in tax case). Thus, if *Chevron* loses its bite, agencies across the government will gain new license to give short shrift to the laws that Congress passed.

B. The First Circuit erred by failing to apply, at *Chevron* Step 1, the rule that ambiguities in deportation laws must be construed in favor of immigrants.

The First Circuit erred by failing to meaningfully apply *any* of the "traditional tools of statutory construction" at *Chevron* Step 1. *Cardoza-Fonseca*, 480 U.S. at 447-48 (quotation marks omitted). But one omission merits special attention.

Even if other tools of construction would yield ambiguity, that ambiguity would be resolved by "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *Cardoza- Fonseca*, 480 U.S. at 449); *see also Kawashima v. Holder*, 565 U.S. 478, 489-90 (2012) (Court has "construed ambiguities in deportation statutes in the alien's favor"); *Errico*, 385 U.S. at 225 (where deportation is consequence, "the doubt should be resolved in favor of the alien"). This principle applies here because BIA's interpretation renders removal a *certainty*, eliminating Pereira's right, which he would otherwise possess, to seek discretionary relief. *See St. Cyr*, 533 U.S. at 319 (applying canon in similar context).

This canon of construction ensures that the harsh consequences resulting from deportation are visited only upon those whom Congress truly intended to be subject to removal. Because "deportation is a drastic measure and at times the equivalent of banishment [or] exile," this Court "will not assume that Congress meant to trench on [a noncitizen's] freedom beyond that which is required by the narrowest of several possible

meanings of the [statute]." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

This canon, like the other normal principles of statutory construction, comes into play at *Chevron* Step 1. That step, as explained above, asks whether statutes are ambiguous after applying "traditional tools of statutory construction." *Cardoza-Fonseca*, 480 U.S. at 447-48 (quotation marks omitted). And this Court has described *this very presumption* as one of the "accepted principles of statutory construction." *Costello v. INS*, 376 U.S. 120, 128 (1964).

Indeed, applying such principles at *Chevron* Step 1 is the only sensible approach. That step is about discerning Congress's intent, and "Congress legislates with knowledge of [this Court's] basic rules of statutory construction." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). Thus, if one of the standard principles of interpretation renders a statute clear, there is no occasion for proceeding to *Chevron*'s second step. *Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009) (same result as to presumption against preemption); *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (presumption against implied rights of action); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (presumption against reaching difficult constitutional questions).

Indeed, failing to apply the principle of construing deportation statutes in favor of the immigrant at *Chevron* Step 1 would nullify the principle. In removal cases, the immigrant's adversary is *always* the BIA. And if statutory ambiguity means that the agency's view prevails, courts will never apply this principle in any case where the Board has decided the question against

the immigrant. By contrast, if applied at Step 1, this principle and *Chevron* each govern within their assigned sphere. Ambiguities arise in many *non*-deportation cases, and when that occurs, deference is due when the BIA reasonably interprets the statute. Even in deportation cases, resolving an ambiguity may benefit some immigrants, but harm others—in which case there is no way to construe the "ambiguit[y] ... in favor of the alien." *St. Cyr*, 533 U.S. at 320 (internal quotation marks omitted).[5] Moreover, if the Step 1 analysis is applied with real rigor, the other traditional tools of construction will sometimes *foreclose* the immigrant's position.

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[5] For example, a non-permanent resident is eligible for cancellation only if he has been physically present "for a continuous period of not less than 10 years," and "has been a person of good moral character during such period." 8 U.S.C. § 1229b(b)(1)(A)-(B). An applicant cannot show "good moral character" during a period when he has given false testimony or been convicted of certain crimes. *Id.* § 1101(f). The BIA has held that this good moral character period runs backwards from "entry of a final administrative decision"—instead of, say, the 10 years that preceded issuance of the notice to appear, or the application for cancellation. *Matter of Ortega-Cabrera*, 23 I. & N. Dec. 793, 798 (B.I.A. 2005). That rule helps some immigrants, but works to others' detriment. Under the Board's rule, an immigrant whose bad act occurred less than 10 years in the past can become eligible for cancellation if enough time passes before the final decision. But an immigrant who commits a bad act *after* the initiation of removal proceedings or an application for cancellation *cannot* make the required showing. *Compare Ortega-Cabrera*, 23 I. & N. Dec. at 798 (noncitizen benefited by Board's rule because ten years had passed since offense), *with Duron-Ortiz v. Holder*, 698 F.3d 523, 527 (7th Cir. 2012) (noncitizen barred from eligibility due to false testimony after application). By contrast, if the Board had decided to measure the period from, say, the application for cancellation, the situation would be reversed.

Hence, true ambiguities will be rarer, lenity will not apply, and the BIA's interpretation may prevail.

* * *

At *Chevron* Step 1, the First Circuit thus violated two imperatives. But when combined, their consequences are especially troubling. The reason courts construe deportation statutes in favor of immigrants, as just explained, is because removal can be "the equivalent of banishment [or] exile." *Fong Haw Tan*, 333 U.S. at 10. And by failing to apply any of the traditional tools of statutory construction *at all* at *Chevron* Step 1—this canon, or any other—the First Circuit gave the BIA latitude to inflict this life-destroying consequence with scant regard for the statute Congress wrote.

II. At *Chevron* Step 2, the First Circuit erred by failing to account for the purposes of the immigration laws, in contravention of *Judulang v. Holder*.

Even if the phrase "notice to appear under section 1229(a)" remained ambiguous after applying all the traditional tools of statutory construction, the First Circuit's task was not complete. At Step 2, a court must still consider whether the agency's interpretation is "arbitrary, capricious, or manifestly contrary" to the statute. *Chevron*, 467 U.S. at 844. The First Circuit did not carry out that task in the manner this Court's precedents demand.

A. *Judulang* required the First Circuit to account for the purposes of the immigration laws at *Chevron* Step 2.

This Court has provided clear guidance on how to conduct *Chevron* Step 2 review. In *Judulang*, this Court held that the BIA's interpretations of immigration statutes are arbitrary and capricious if they are not tied "to the purposes of the immigration laws or the appropriate operation of the immigration system." 565 U.S. at 55.[6] *Judulang* involved the BIA's "comparable-grounds" rule, which the BIA used to determine whether an immigrant who pleaded guilty to a deportable offense was eligible to seek for relief under section 212(c) of the Immigration and Nationality Act. The BIA went about this by determining whether the offense to which the immigrant had pled guilty was "substantially equivalent" to one of the offenses that would render an immigrant *excludable*.

This Court held that the comparable-grounds rule was arbitrary and capricious because it did not "rest on any factors relevant to whether an alien (or any group of aliens) should be deported." *Id.* at 58. "Rather than considering factors that might be thought germane to the deportation decision," the BIA made an immigrant's eligibility to seek relief depend on an irrelevant comparison to a different statute. *Id.* at 55. This was reversible error because "[t]he BIA's comparable-

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[6] While *Judulang* deemed the Administrative Procedures Act's "arbitrary and capricious" review to be a better fit for the question at issue there, it explained that the "analysis would be the same ... under *Chevron* step two." 565 U.S. at 52 n.7.

grounds rule [was] unmoored from the purposes and concerns of the immigration laws." *Id.* at 64.

B. The stop-time rule serves as a narrow anti-gaming limit to cancellation of removal and the critical humanitarian purposes served by cancellation.

In light of *Judulang*, it was incumbent on the First Circuit to consider whether the BIA's interpretation accords with "the purposes of the immigration laws or the appropriate operation of the immigration system"—specifically, the combined purposes of cancellation of removal and the stop-time rule. *Id.* at 55. These purposes are well established.

Cancellation of removal is a discretionary form of relief "designed to accomplish a humanitarian result." *Errico*, 385 U.S. at 225. It is reserved for immigrants who have resided in this country for years, who have good moral character, and for whom removal would be an "exceptional and extremely unusual hardship" for the immigrant's family members who are citizens of the United States. 8 U.S.C. § 1229b(b)(1)(A)-(D).

Congress created this type of discretionary relief to inject equity into removal proceedings. As Congress and this Court have long recognized, "[d]eportation can be the equivalent of banishment or exile." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947). For immigrants who have been in this country for many years—and particularly for those who have families in this country—"deportation may result in the loss 'of all that makes life worth living.'" *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (quoting *Ng Fung Ho v. White*, 259 U.S.

276, 284 (1922) (Brandeis, J.)). And for many immigrants, the only thing standing between them and this fate is the chance to seek cancellation of removal.

Discretionary relief has saved thousands of immigrants from this fate and kept thousands of families together over the years. As this Court acknowledged in *St. Cyr*, discretionary relief has "had great practical importance" for immigrants and their families. *St. Cyr*, 533 U.S. at 295. Under a statutory predecessor to cancellation, waiver of deportation under 212(c) of the Immigration and Nationality Act, the number of immigrants who depended on discretionary relief was "extremely large." *Id.* at 296. And a "substantial percentage" of the applications for deportation waivers—more than half—were granted between 1989 and 1995. *Id.* at 296 & n.5.

Congress added the stop-time rule to solve a very narrow problem in the mechanisms for discretionary relief that existed prior to 1996. The rule addressed "perceived abuses arising from the prior practice of allowing periods of continuous physical presence to accrue after service of the charging document." *Matter of Cisneros*, 23 I. & N. Dec. 668, 670 (B.I.A. 2004). Before the stop-time rule, an immigrant's period of continuous presence or residence continued to run during the pendency of removal proceedings. This created an incentive, Congress believed, for immigrants to delay proceedings until they became eligible for cancellation. H.R. Rep. No. 104-469, pt. I, at 122 (1996). Thus, Congress was concerned that immigrants would often "request and obtain multiple continuances, in order to change the venue of their hearing, obtain an attorney, or

prepare an application for relief." *Id.* Congress added the stop-time rule to prevent immigrants from gaming the system by making it impossible for them to become eligible for cancellation through these "delay[ing] strategies." *Id.*

Here, as explained in the next two sections, the First Circuit erred by ignoring the broader humanitarian purposes of cancellation of removal, and then by misconstruing and misapplying the anti-gaming rationale of the stop-time rule.

C. The First Circuit and the BIA gave no consideration to the fundamental humanitarian purposes of cancellation of removal.

The First Circuit made no effort to construe the stop-time rule in light of the fundamental humanitarian purposes of cancellation. Neither did the BIA. *See Matter of Camarillo*, 25 I. & N. Dec. 644, 649-50 (B.I.A. 2011) (discussing the legislative history of the stop-time rule). This is a glaring omission. The stop-time rule—whose purposes the First Circuit misapplied—does not exist in a vacuum. It is an integral part of the process for seeking cancellation of removal, and all the critical humanitarian purposes that process serves.

That omission is reversible error in itself. Under *Chevron*, reviewing courts must ensure that agencies are considering all the relevant factors and the fundamental purposes of the statutes they interpret. *See Judulang*, 565 U.S. at 52 n.7, 55. Thus, this Court has consistently relied on the fundamental purposes of the immigration laws to resolve ambiguities in

immigration statutes. *See, e.g., St. Cyr*, 533 U.S. at 320; *Errico*, 385 U.S. at 224-25. And the Court has held that the BIA and the lower courts err when they fail to account for these purposes. *See Judulang*, 565 U.S. at 64. The canon of construction discussed above, requiring ambiguous deportation statutes to be construed in immigrants' favor, reflects the importance of these purposes. *Supra* at 16-17. An interpretation of an ambiguous immigration statute cannot be "reasonable" under *Chevron* when it fails to consider these purposes. *Judulang*, 565 U.S. at 64. And in particular, no interpretation of an ambiguous statute implicating cancellation can be reasonable when it ignores the humanitarian purposes of that relief. *See id.*

Here, the First Circuit failed to consider how badly the BIA's interpretation undermines cancellation's humanitarian purposes. "Deportation is always a harsh measure." *Cardoza-Fonseca*, 480 U.S. at 449. Even when permitted by law, it severs families and sends immigrants into exile in a land that has ceased to be their home. *See, e.g., Errico*, 385 U.S. at 225; *Fong Haw Tan*, 333 U.S. at 10; *Delgadillo*, 332 U.S. at 391. That is precisely why cancellation exists—it gives the government discretion to act mercifully in cases where these consequences would be exceedingly harsh.

The BIA's interpretation, however, excludes immigrants from this relief by making them ineligible to even seek it—for reasons irrelevant to whether they are deserving of relief. For example, Pereira is ineligible for discretionary relief because, and only because, the BIA has chosen to treat documents labeled "notice to appear" as effective to trigger the stop-time rule, when Congress

concededly did not mandate that result. Had the BIA adopted the opposite interpretation, as the government does not dispute it could have done, Pereira would have had his application adjudicated on the merits—receiving relief if deserved, and if not, not.

Indeed, the BIA's interpretation is especially unreasonable because it does not hinder the government's ability to remove immigrants when granting relief would *not* be consistent with cancellation's humanitarian purposes. Cancellation is discretionary. If any applicant has engaged in anything like the gaming activity targeted by the stop-time rule, an immigration judge or the Board would be well within their rights to simply deny the applicant relief in the exercise of discretion. Nor will rejecting the BIA's interpretation here meaningfully increase the burden on immigration courts. The government has never presented any evidence that a large number of immigrants are in Pereira's situation—not eligible for cancellation if the government's placeholder "notice to appear" triggered the stop-time rule, but eligible if their clocks continued to run until service of a genuine notice to appear. Indeed, if the government were *diligent* in promptly providing the hearing date and time, this situation would virtually *never* occur. And regardless, the government has no legitimate interest in *avoiding* deciding cancellation applications on their merits, unless Congress has directed that result.

D. The BIA's interpretation does not advance the anti-gaming rationale of the stop-time rule.

To be sure, the stop-time rule has its own purposes, and those purposes also have a claim on whether the

BIA's interpretation is reasonable. *Cf. Martinez Gutierrez*, 566 U.S. at 594 (While the goals of "'providing relief to aliens with strong ties to the United States' and 'promoting family unity' ... underlie or inform many provisions of immigration law," these "are not the INA's only goals, and Congress did not pursue them to the *n* th degree"). But here, the BIA's interpretation does not advance the stop-time rule's purposes, either. The First Circuit erred in concluding otherwise.

The First Circuit acknowledged the stop-time rule's *actual* purpose: to prevent immigrants from intentionally delaying removal proceedings to gain eligibility for cancellation. Pet. App. 12a. But the BIA's interpretation here has nothing to do with that purpose. Whether a notice to appear complies with the statute's requirements is entirely within *DHS*'s discretion. Permitting DHS to rely on notices that do not comply with the statute in no way advances the stop-time rule's anti-gaming purpose.

Instead, the First Circuit concluded that the BIA's rule was reasonable in light of a more general concern about "delay and inefficiency" in the immigration process. Pet. App. 13a. According to the First Circuit, the creation of the notice to appear was meant to prevent "protracted disputes concerning whether an alien has been provided proper notice of a proceeding." Pet. App. 13a-14a (quoting H.R. Rep. 104-469, pt. I, at 159 (1996)).

On both counts, the First Circuit got it wrong. The stop-time rule's purpose is not simply to prevent delays *in general*. It is to prevent immigrants from becoming eligible for cancellation *by causing* those delays. *See* H.R. Rep. No. 104-469, pt. I, at 122. Receiving notice of

all the information listed in section 1229(a) in no way enables immigrants to benefit from causing such delays.

To the contrary, the only gaming here, and the only delays, are solely DHS's responsibility. As Pereira explains, when DHS serves documents captioned "notice to appear" with the hearing date and time "to be set" or "to be determined," immigrants obtain hearing dates and times only after DHS files the "notice to appear" with the immigration court, which in turn identifies the hearing date and time. J.A. 9; Pet. App. 3a; Pet'r's Br. 18. DHS, however, does not even view itself as obligated to file this "notice to appear" *promptly*. Instead, DHS often waits *years* to file the notice and proceed with removal.[7] Nothing in the stop-time rule's purposes supports allowing DHS, by the simple expedient of issuing a document captioned "notice to appear," to end an immigrant's residency clock years before it intends to actually *proceed* with showing that the immigrant is removable. *Cf.* 8 C.F.R. § 1239.1 (removal proceeding is commenced "by the filing of a notice to appear with the

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[7] *See, e.g.*, Pet. App. 3a (notice here filed "[m]ore than a year later"); *Camarillo*, 25 I. & N. Dec. at 644-45 & n.1 (notice to appear served in 2005 but not filed until 2007); *Matter of Mendoza-Orozco*, A096 193 299 - LOS, 2009 WL 3063499, at *1 (B.I.A. Sept. 4, 2009) ("[R]espondent was personally served with the Notice to Appear on January 21, 2003," but it "was not filed with the Immigration Court until November 18, 2007, almost 5 years later."); *Matter of Fernandes-De Oliveira*, A098 988 585 - ORL, 2014 WL 3795502, at *2 (B.I.A. June 16, 2014) ("DHS did not file the NTA with the Immigration Court until 2 years after issuing and serving the NTA"); *Velasquez-Escovar v. Holder*, 768 F.3d 1000, 1002 (9th Cir. 2014) (two-year delay); *Le Bin Zhu v. Holder*, 622 F.3d 87, 89 (1st Cir. 2010) (notice to appear served in 2001 and filed in 2003).

immigration court"). Congress commanded the precise opposite: for DHS to serve a notice to appear, DHS must provide the immigrant his or her hearing date and time.

Congress's concern about avoiding "protracted disputes," invoked by the First Circuit, was about something else entirely. "[L]ack of accurate information on alien's addresses" meant that immigrants, after being ordered deported in absentia, often "petition[ed] to reopen ... on the grounds that they never received proper notice." H.R. Rep. 104-469, pt. I, at 159. This problem and its solution have nothing to do with DHS's decision to systematically deviate from providing the information required by § 1229(a).

To the extent "protracted disputes" about the adequacy of notice are relevant to this case, they only underscore that DHS's interpretation is unreasonable and violates Congress's clear intent. Congress specifically enumerated the information that a notice to appear must provide. The notice dispute at issue here arose only because DHS has departed from the "single form of notice" established by Congress. H.R. Rep. 104-469, pt. I, at 159. A holding from this Court confirming that DHS must include *all* the information listed in § 1229(a) would end disputes of this sort.

On the other side, even if the BIA prevailed here, its interpretation ensures that protracted disputes will continue. If a notice to appear need not include *all* the information required by § 1229(a) to trigger the stop-time rule, myriad further disputes will follow. Are there any pieces of information that a notice to appear *must* contain? If so, what are they? And how can § 1229(a)'s requirements be sorted into truly mandatory

requirements, on the one hand, and optional requirements, on the other? It is hard to understand how the BIA's interpretation furthers the purpose of avoiding "protracted disputes" when, to affirm that interpretation, the First Circuit had to create a new category of "curable defects," Pet. App. 8a, 13a, leaving to future cases what defects might qualify. *Cf. Urbina*, 745 F.3d at 740 (notice triggered stop-time rule because it "substantially complied" with statute).

* * *

The stop-time rule's anti-gaming rationale thus does not support the BIA's interpretation. But regardless, that would not excuse the BIA or the First Circuit from considering the "the purposes of the immigration laws" as a whole or "the appropriate operation of the immigration system." *Judulang*, 565 U.S. at 55. Yet the BIA and the First Circuit failed to do so, contravening this Court's precedents.

E. The First Circuit erred by ignoring the core purposes of the immigration laws in favor of "administrative context."

Rather than consider cancellation's critical humanitarian purposes, the First Circuit and the BIA relied on "administrative context" and the convenience of sending out notices without information about the time and date of an immigrant's initial hearing. But "administrative context" and convenience are no substitutes for the inquiry that *Judulang* demands.

To start, administrative convenience is not one of the purposes of the immigration laws. Although administrability may sometimes be a relevant factor

that the BIA can consider, it cannot rescue an interpretation that is otherwise arbitrary and capricious, or that is "unmoored from the purposes and concerns of the immigration laws." *Judulang*, 565 U.S. at 64. As *Judulang* explained, "cheapness alone cannot save an arbitrary agency policy." *Id.* Nor is an agency's existing practice a sufficient justification. "Arbitrary agency action becomes no less so by simple dint of repetition." *Id.* at 61.

The BIA's reliance on "administrative context" is especially arbitrary here. The crux of the BIA's "administrative context" rationale is that because "'DHS frequently serves [notices to appear] where there is no immediate access to docketing information'"—because the immigration court, rather than DHS, schedules cases—"'it is often not practical to include the date and time of the initial removal hearing on the notice to appear." Pet. App. 12a (alteration in original) (quoting *Camarillo*, 25 I. & N. Dec. at 648). Per the First Circuit, the BIA's interpretation was reasonable because it accommodated these "practical constraints." *Id.*

But first, it is simply *not true* that DHS has no ability to schedule hearings in advance of sending out notices to appear. The immigration courts have developed an "interactive scheduling system," or "ISS," that "enables the Department of Homeland Security to access the ... system data base to enter case data and to schedule the initial master calendar hearing." U.S. Dep't of Justice Executive Office for Immigration Review, Office of the Chief Immigration Judge, Uniform Docketing System Manual at I-2 (Rev. Dec. 2013),

https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/07/DocketManual_12_2013.pdf. Then, the "[c]harging documents that have been interactively scheduled by the DHS will bear the date and time of the initial hearing." *Id.* at I-8.

To be sure, *Amicus* is aware that the government has stated in an interrogatory response that "ISS has not been active since approximately May 2014."[8] But that only underscores the more fundamental problem with the BIA's "administrative context" rationale. Even if some logistical problem exists *today*, it is one entirely of the government's own making. DHS and the immigration courts are both executive branch agencies. No law of physics prevents DHS and immigration courts from working together to schedule hearings before sending a notice to appear. One hand just needs to know what the other hand is doing. Indeed, in many jurisdictions, even *traffic tickets* issued by police officers on the spot come with the date and time of an initial hearing.[9] The federal executive branch can surely do as

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[8] *See* Defendant Executive Office for Immigration Review's Responses to Plaintiffs' First Set of Interrogatories at 8, attached as Ex. F to Decl. of Glenda M. Aldana in Support of Motion for Summary Judgment, *Mendez Rojas v. Kelly*, No. 16-cv-1024 RSM (W.D. Wash. Oct. 30, 2017), ECF No. 58-1, https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/mendez-rojas_v_john_son_exhibits_in_support_of_plantiffs_motion_for_summary_pjudgement.pdf.

[9] *See, e.g.*, California Courts, *Traffic & Ticket Basics*, http://www.courts.ca.gov/8452.htm (last visited Feb. 26, 2018) ("Notice to Appear" includes "date given on the ticket"); City of New Orleans, *Municipal and Traffic Court of New Orleans*,

well with notices to appear issued by DHS. And if DHS needs better access to information from the immigration court to provide the information that Congress mandated in § 1229(a), DHS has every ability to obtain it. By contrast, it is a poor excuse indeed for departing from Congress's designated form of notice that two executive branch agencies have chosen not to put forth the effort necessary to carry out Congress's commands.

At bottom, the government's position here boils down to the claim that it is entitled to give short shrift to the plain text of § 1229(a) and § 1229b(d)(1), and the critical humanitarian purposes of cancellation, simply to gain some marginal administrative convenience for DHS. That conclusion is not entitled to deference under *Chevron*, at either Step 1 or Step 2. This Court should reverse.

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https://www.nola.gov/traffic-court/ (last visited Feb. 26, 2018) ("traffic citation ... has written the ... first appearance date").

CONCLUSION

The judgment of the First Circuit should be reversed.

Respectfully submitted,

CHARLES ROTH
NATIONAL IMMIGRANT
JUSTICE CENTER
208 S. LaSalle
Suite 1818
Chicago, IL 60604
(312) 660-1613

LINDSAY C. HARRISON
Counsel of Record
ZACHARY C. SCHAUF
JONATHAN A. LANGLINAIS
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
lharrison@jenner.com

No. 17-459

IN THE

Supreme Court of the United States

WESCLEY FONSECA PEREIRA,

Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF FORMER BIA CHAIRMAN AND IMMIGRATION JUDGE PAUL WICKHAM SCHMIDT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ERIC F. CITRON
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

QUESTION PRESENTED

Whether, to trigger the stop-time rule by serving a "notice to appear under section 1229(a)," the government must "specify" the items listed in 8 U.S.C. § 1229(a)'s definition of a "notice to appear," including "[t]he time and place at which the proceedings will be held."

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INTEREST OF *AMICUS CURIAE*[*]

Amicus Judge Paul Wickham Schmidt served for eight years as a Member of the Board of Immigration Appeals—six of them as Chairman—and served as an Immigration Judge for an additional 13 years, from April of 2003 until June of 2016. In his 21 years in the immigration court system, he adjudicated tens of thousands of cases at the trial and appellate level, and became intimately familiar with the procedures, practices, and on-the-ground realities of the U.S. Immigration Court. Since his retirement from the immigration bench, Judge Schmidt has remained interested and involved in immigration law generally, with an emphasis on issues related to immigration courts and adjudication. He serves as an Adjunct Professor of Law at Georgetown, working on immigration-related issues, and is an officer or member of multiple organizations with a focus on immigration law and administration. He writes to share his knowledge and perspective with the Court, in the hope that his insights into the realities of immigration-court litigation will genuinely assist the Court in reaching its decision in this case.

SUMMARY OF ARGUMENT

As further explained below, the immigration authorities once had a system for providing complete and statutorily compliant Notices to Appear, they should have such a system, and they could and likely would

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[*] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represents that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or his counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for petitioner and respondent have consented to the filing of this brief.

create such a system were this Court to encourage that result by deeming their existing practice insufficient to trigger the stop-time rule.

ARGUMENT

Providing notices to appear that comply with Section 1229(a)(1) is both feasible and desirable from the standpoint of the efficient administration of the immigration system.

Judge Schmidt had extensive experience with the immigration court system. From February 1995 to March 2001, he was Chairman of the Board of Immigration Appeals (BIA). From 2001 to 2003, he continued to serve as a Member of the BIA. Thereafter, he was appointed as an Immigration Judge (IJ) in April 2003, and he served for the next thirteen years as a United States Immigration Judge at the United States Immigration Court in Arlington, Virginia. In both capacities, he adjudicated tens of thousands of cases and became thoroughly familiar with the procedures and on-the-ground systems and practices that the immigration authorities and courts used to process cases. But it was on-the-ground experience as an IJ in Arlington that left him best informed about how the system actually works, as well as its current bureaucratic shortcomings.

One overarching design issue for the system is that the Department of Homeland Security (DHS) and the Immigration Court system are different agencies and have different roles in this system, with a somewhat haphazard division of responsibilities between them. The Immigration Court is housed within the Department of Justice and governed by the Executive Office for Immigration Review (EOIR) rather than

DHS. And under current regulations, it is DHS (rather than the Immigration Court) that commences a removal case by serving a Notice to Appear (NTA) on the foreign national "respondent" and filing that notice with the Immigration Court. DHS has the active role (serving NTAs on those against whom it wishes to institute removal proceedings and filing cases), while the Immigration Court has a passive role in this system (receiving and docketing these notices as part of its case-initiation process). And depending on how the system is administered, respondents very well might know that DHS has started a case against them before the Immigration Court knows it, let alone gets that case onto its calendar.

In fact, under current regulations and procedures, the Immigration Court does not actually take jurisdiction over a removal case until the NTA is "filed" with the Immigration Court by DHS and entered into the Immigration Court's computerized docket system—and that can take a while. A Docket Clerk of the Immigration Court performs the latter action *by hand*. Because of the heavy workloads at both DHS and the Immigration Court, there often are substantial delays between the date on which an NTA is served and the date it appears on the Immigration Court's computerized docket and thus is considered "filed" with the Immigration Court. And during that period of governmental delay, the NTA is essentially in No Man's Land: Nothing can be scheduled or docketed in the meantime. Indeed, because the case does not yet appear on the Immigration Court's docket, any legal papers—including Change of Address forms—filed with the Immigration Court during this period cannot be matched with a physical Record of Proceeding ("ROP").

And Judge Schmidt's experience was that documents that were not immediately posted to the ROP were frequently lost and not readily retrievable.

The NTA informs the respondent of a number of important things they need to know if the system is to run smoothly and they are to have a fair chance to defend their immigration case. These include: (1) the nature of the legal charges DHS is bringing; (2) the date, time, address, and courtroom at which the respondent must appear to defend those charges; and (3) various warnings, including the right to obtain counsel at no expense to the Government, the obligation to report changes in address to the Immigration Court, and the consequences of a failure to appear for any removal hearing. Because there is currently no "e-filing" system in Immigration Court, however, the Court Clerk must manually enter all data—*including* the relevant data from the NTA—into the Immigration Court's internal docket system if it is to match the information that the respondent has been given. And given the volume of cases, time pressures, and periodic staffing shortages, data entry errors are common and provide another reason why scheduling and accurate docketing of important documents (including mailing addresses) can be delayed or confused. This would, for fairly obvious reasons, work much more smoothly and error-free if the information was determined by or entered into the Immigration Court's computer system before a notice with that information was sent out to the respondent.

Relatedly, and most important for present purposes, this seemingly backwards and byzantine approach to the immigration bureaucracy can make trou-

ble when it comes to routine scheduling and other matters. That is because scheduling and administration ultimately depends in large part on the Immigration Court, while responsibility for notifying the respondent of these details lies with DHS in the first instance. This design flaw has, in part, given rise to this case.

Given that the government's current regulations and practices make DHS responsible for serving the NTA—while the Immigration Court schedules the removal hearing dockets whenever the information from that NTA is *later* manually (and accurately?) entered into the docket system— DHS does not know the time, date, and courtroom for the hearing without some interaction with the Immigration Court. There are two ways to fix this problem. One would be to correct the obvious design flaw that makes it difficult to provide a complete, correct and statutorily-compliant notice (while also introducing many of the other errors described above). The other, which the government has chosen, is for DHS to serve NTAs with the notation that the time, date, and courtroom for the hearing are "to be determined" ("TBD") by the Immigration Court.

Putting aside due process and other concerns with this kind of "notice," as well as the obvious tension between such notice and the requirements of 8 U.S.C. § 1229(a)(1), this turns out to be a suboptimal approach from a purely bureaucratic perspective. "TBD" cases insert another step in the system, wherein the Immigration Court Clerk's office must send out by regular U.S. Mail a written Notice of Hearing ("NOH") scheduling the initial Master Calendar Hearing before the Immigration Court. These hearings are, essentially, the immigration system's version of an initial arraignment, and so it is critical that the respondent

be accurately informed about where they need to be, when they need to be there, why they are coming, and what will happen if they don't show up. But (as mentioned above), the Immigration Court Clerk's office is already buried in a host of tasks that require manual data-entry, and so this extra step introduces the potential for further delay, further data-entry errors, and problems with regular U.S. Mail delivery.

Simply put, in Judge Schmidt's experience, using TBD notices increased the potential for defective notices, which tended to result, in turn, "in absentia Removal Orders" that are later challenged, while only adding to the work of an overburdened Clerk's office. TBD notices thereby introduced more delay and inaccuracy into the system, and resulted with some frequency in procedurally unfair results as well.

To address the foregoing difficulties, however, EOIR and DHS did eventually work together to develop something called the "Interactive Scheduling System" ("ISS"). The ISS enabled the offices at DHS with authority to issue NTAs to have direct access to a computerized list of "available" Master Calendar dates at the various local Immigration Courts. This, in turn, allowed DHS to specify an exact date, time, and courtroom for the Master Calendar in the NTA, while also marking that date as now occupied by the new case. This was, for obvious reasons, a much better way to run the railroad.

When Judge Schmidt arrived at the Arlington Immigration Court in April 2003, many of the cases on his Master Calendar were scheduled through the ISS and, therefore, had the exact time, date, and courtroom specified on the NTA. Other Initial Master Calendar hearings were TBD, however, meaning that the

hearing had been scheduled by the Immigration Court Clerk's office sending out an NOH, rather than by the NTA. Unsurprisingly, the former cases tended to proceed much more smoothly than the latter.

This system did not deprive IJs like Judge Schmidt over any control they would have otherwise had over their Master Calendars. That is because Judge Schmidt and other IJs had neither input nor control over the scheduling of their Master Calendar hearings in the first place. That function was assigned to the Court Administrator who worked directly for an Assistant Chief Immigration Judge at EOIR Headquarters in Falls Church, Virginia. That Court Administrator did not work for the IJs who actually heard cases at the Arlington Immigration Court, and was not responsive to their individualized or systemic concerns.

As Judge Schmidt's time at the Arlington Immigration Court progressed, and his docket grew, he observed that the number of initial Master Calendar cases scheduled through the ISS diminished in relation to the number of initial Master Calendars scheduled on a TBD basis using the NOH. He does not know exactly why. On its face, this unfortunate development seemed correlated to an increase in caseload, changing priorities implemented by EOIR Headquarters, and staffing shortages among the Immigration Court clerks. But the effect of ISS's increasing obsolescence was ironic from these standpoints, because more fully implementing such a system would have helped to smooth operations, limit errors, and reduce the workload in the Clerk's office. It would be a good thing if the agencies involved had a reason to bring it back and make it work.

Judge Schmidt is not aware of the current status of the ISS or whether it still operates at all. But he is confident that there are no technical or legal barriers that would foreclose development of an ISS capable of providing exact initial Master Calendar hearing dates and information for all or nearly all NTAs issued by DHS. Creating such a system would make things *easier*, not harder, on the Immigration Court's Clerk's office, would reduce the manual data-entry workload on that office, would reduce data-entry and mailing errors, would immediately establish a docket under which a Change of Address or other early-filed form could be accurately filed, and would also (of course) limit the real risk of procedurally unfair results. Judge Schmidt's frank impression was that this was the kind of system any private-sector bureaucracy would have implemented long ago *for its own sake*.

To put a fine point on it, including time-and-place information in the NTA is not only what the statute requires, but it would also be in *everyone's* interest to have a system for doing so: It would help not only the respondents who deserve immediate, accurate, and complete notice in their NTAs, but the IJs, clerks, Court Administrators, Assistant Chief Immigration Judges, DHS officials, BIA members, and EOIR officials who toil away in this system. And that is not to mention the taxpayers, who actually fund this system and expect DHS and the Immigration Court to produce reasonably fair, accurate, and timely results.

CONCLUSION

Amicus Judge Schmidt respectfully submits that the decision below should be reversed. If DHS wants its initial notice to trigger the stop-time rule, it should work with the Immigration Courts to solve the readily solvable problem of scheduling Master Calendar hearings before NTAs are served.

Respectfully submitted,

ERIC F. CITRON
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

February 28, 2018